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No. 94-

In The
Supreme Court of the United States

OCTOBER TERM, 1994

SOUTHVIEW FARM AND RICHARD H. POPP,
Petitioners,

v.

CONCERNED AREA RESIDENTS FOR
THE ENVIRONMENT, *et al.*, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a dairy farm that uses its animal manure to fertilize its feed crop fields is a "concentrated animal feeding operation" and thus a point source subject to the permit requirements of the Clean Water Act.

2. Whether liquid manure washed off farm fields by a rainstorm is an "agricultural stormwater discharge" exempt from the Clean Water Act's definition of point source.

3. Whether manure-spreading equipment or a depression in a farm field, neither of which directly discharges pollutants into navigable waters, is a point source subject to the permit requirements of the Clean Water Act.

RULE 29.1 STATEMENT AND PARTIES TO THE PROCEEDING

Petitioner Southview Farm has no parent or non-wholly owned subsidiary corporations.

In addition to the party named as respondent in the caption, the following persons were plaintiffs-appellants below and are respondents here: Philip Karcheski and Kathleen Karcheski, individually and as parents and legal guardians of Brian Karcheski and Robyn Karcheski, infants; Lois E. Link; Daniel L. Wilson; William A. Fagan; Betty C. Fagan; Jeffrey Ferris and Linda Ferris, individually and as parents and legal guardians of Chad J. Ferris, Stacey P. Ferris, and Shawn W. Ferris; and Kirk Schroeder, individually and as parent and legal guardian of Stacy L. Schroeder, Kirk Bly and Vickie Bly.

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West Lynn Creamery, Inc. v. *Healy*, 114 S. Ct. 2205 (1994) 24

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40 C.F.R. § 122.23 . . . . . 5, 13, 14

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40 C.F.R. § 122.26 5

40 C.F.R. § 412.12 14

58 Fed. Reg. 7610 (1993) 5, 14, 16

Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 16

Miscellaneous:

Davidson, *Thinking About Nonpoint Sources of Water Pollution and South Dakota Agriculture*, 34 S.D. L. Rev. 20, 21 (1988/1989) 16, 17, 20

Fentress, *Nonpoint Source Pollution, Groundwater, and the 1987 Water Quality Act: Section 208 Revisited?*, 19 Envtl. L. 807 (1989) 20

Gould, *Agriculture, Nonpoint Source Pollution, and Federal Law*, 23 U.C. Davis L. Rev. 461 (1990) 12, 19

Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 Neb. L. Rev. 210 (1993) 23

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Letson, *Point/Nonpoint Source Pollution Reduction Trading: An Interpretive Survey*, 32 Nat. Resources J. 219 (1992) 21

Noble & Looney, *The Emerging Legal Framework for Animal Agricultural Waste Management in Arkansas*, 47 Ark. L. Rev. 159 (1994) 21

Pins, *25% Quit Farming in 1980's*, Des Moines Reg., May 22, 1992, at 1A 24

S. Rep. No. 370, 95th Cong., 1st Sess., *reprinted in* 1977 U.S.C.C.A.N. 4326 9

S. Rep. No. 414, 92d Cong., 1st Sess., *reprinted in* 1972 U.S.C.C.A.N. 3668 . . 10, 12, 20

Sivas, *Groundwater Pollution from Agricultural Activities: Policies for Protection*, 7 Stan. Envtl. L.J. 117 (1987/1988) 10, 21, 23

U.S. EPA, Office of Water, *Managing Nonpoint Source Pollution: Final Report to Congress on Section 319 of the Clean Water Act* (1992) 12, 20, 21

U.S. EPA, Office of Water, *Nonpoint Source Guidance* (1987) 9

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The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 34 F.3d 114. The opinion of the district court (App., *infra*, 23a-54a) is reported at 834 F. Supp. 1422.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1994, and a timely petition for rehearing was denied on November 3, 1994. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory and regulatory provisions relevant to this case are set forth at App. 55a-57a, *infra*.

STATEMENT

This case involves a judicial override of federal legislation exempting commonplace agricultural activities from the permit requirements of the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.* A jury found that petitioner Southview Farm ("Southview") had violated the CWA by failing to obtain a permit before fertilizing its feed crops with liquid manure that eventually found its way into navigable waters. The district court thereafter granted Southview judgment as a matter of law, holding that plaintiffs had failed to show that the discharges in question emanated from a point source and thus required a permit under the CWA. First, the court ruled, Southview falls outside the regulatory definition of a "concentrated animal feeding operation" ("CAFO")—the only type of agricultural operation included by Congress within the definition of point source—because it raises feed crops and therefore is covered by the CWA exemption for large livestock farms that grow crops or forage on any part of the farm facility. Second, a number of the discharges in issue were "agricultural stormwater discharges," which Congress specifically exempted from the definition of point source.

In an opinion written by Judge Oakes, the Second Circuit reversed. The court of appeals construed the definition of a CAFO so narrowly that a large dairy farm would have to grow crops *inside* its cattle barns to qualify for the CWA exemption for livestock operations that raise crops or forage, effectively destroying that exemption. The court also read "agricultural stormwater discharges" to mean only *pure rainwater*, thereby rendering Congress' exemption inapplicable to any agricultural stormwater, which invariably includes other matter. Finally, the Second Circuit detected

indirect point sources at Southview in the form of manure spreaders and a depression in a field. In reality, this is a case in which a court of appeals, in a burst of environmental zeal, decided that Congress was too soft on agricultural pollution and re-wrote the law to satisfy its own preference for broader federal regulation than Congress thought desirable.

As we demonstrate below, Congress was well aware that water pollution may emanate from agricultural nonpoint sources. It nevertheless made a deliberate policy choice that the states, rather than the federal government, should bear primary responsibility for addressing such pollution. Congress recognized that diffuse discharges of the type alleged here are difficult and costly for the federal government to regulate, requiring flexible and site-specific oversight that local authorities are better able to administer, and that American agriculture would be severely harmed by imposition of the CWA's permitting regime.

The Second Circuit's revision of the CWA's scheme of regulation threatens American farmers with a new layer of costly and burdensome federal regulation not intended by Congress. If the court of appeals' decision stands, farmers will have to seek a federal permit before applying fertilizers, including recycled animal wastes such as those used by Southview, to their fields. They will also have to comply with the manifold requirements associated with the CWA's permit program, designed to control industrial and municipal—not agricultural—wastes. Added costs, in the form of permit applications, compliance expenses, CWA penalties, and legal fees, for common and necessary fertilization performed on a routine basis by farmers throughout this country, would further squeeze farmers' already limited profits and could in some circumstances render dairy and livestock farming economically unviable.

A court may not, consistent with the constitutional principle of separation of powers, reregulate an area that Congress has chosen to deregulate. As this Court noted in reviewing a prosecution under the Rivers and Harbors Act, this country's water pollution problems do not "warrant us in manufacturing offenses where Congress has not acted." *United States* v. *Standard Oil*, 384 U.S. 224, 225 (1966). This Court should grant certiorari to prevent a judicial override of Congressional policymaking on issues of fundamental importance to this nation's agricultural industry.

A. The Statutory Framework

A description of the facts in this case requires an initial overview of the statutory framework. The Clean Water Act originated in the Federal Water Pollution Control Amendments of 1972, 86 Stat. 816, codified as amended, 33 U.S.C. § 1251 *et seq.*, which imposed effluent limitations on point source discharges through a federally mandated and supervised permit system, the National Pollution Discharge Elimination System ("NPDES"). 86 Stat. at 883, codified as amended, 33 U.S.C. § 1342. Section 208 addressed *nonpoint* sources through a planning process that placed primary responsibility on the states. 86 Stat. at 839, 33 U.S.C. § 1288. The statute was renamed the Clean Water Act in 1977.

The CWA makes unlawful, absent a permit, "the discharge of any pollutant." 33 U.S.C. § 1311(a). A "discharge" is "any addition of any pollutant to navigable waters from any point source." *Id.*, § 1362(12). A "point source," in turn, is defined to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.*, § 1362(14). A point source specifically "does not include agricultural

stormwater discharges and return flows from irrigated agriculture." *Ibid.*

A "concentrated animal feeding operation" or CAFO—which is a particular type of point source—is not defined in the statute. It is defined in the implementing regulations as an animal feeding operation ("AFO") that meets the criteria of Appendix B, that is, contains more than 700 mature cattle. 40 C.F.R. § 122.23(b). An AFO, in turn, is "a *lot* or *facility* * * * where * * *

> (i) Animals * * * have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and, (ii) *Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.*"

Id. at § 122.23(b)(1) (emphasis added). The Environmental Protection Agency ("EPA") has further specified that the definition of a CAFO "does not include areas of the facility where crops or forage crops are maintained throughout the growing season." 58 Fed. Reg. 7610, 7616 (1993).

The phrase "agricultural stormwater discharge" is not defined in either the statute or regulations. "Stormwater," however, is defined in regulations governing industrial and municipal discharges as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13). And the EPA recently defined stormwater, in the course of explaining changes in CAFO permits, as "runoff caused by rainfall, snowmelt, or drainage which flows overland instead of percolation into the soils due to saturation." 58 Fed. Reg. 7610, 7614 (1993).

B. Factual Background

Petitioner Southview, which is managed by petitioner Richard H. Popp, is a large dairy farm in Castile, in upstate New York's Wyoming County. It has approximately 1,290 milking cows and 900 calves and heifers, primarily housed in barns. Southview grows food for its herd, including alfalfa, clover, corn silage, and grasses, in fields that abut the barns and that are an integral part of the farm and its operations. Instead of relying exclusively on chemical fertilizers, Southview recycles its own cow manure. After the manure is filtered through a liquid/solid separator, the liquids are stored in a lagoon. The liquid manure is then pumped from the lagoon into tank spreaders or a spray pivot system, which apply it directly onto Southview's crop fields. App., *infra*, 3a-4a.

Plaintiffs, an ad hoc group of local residents, brought a citizen's suit against Southview under the CWA. They alleged that on occasion between 1989 and 1991 some of the liquid manure applied to Southview's fields had eventually entered local waterways, in violation of CWA § 1311(a), which requires a federal permit for "the discharge of any pollutant." After denials of defendants' motions to dismiss and for summary judgment, eleven alleged CWA violations were submitted to a jury. The jury returned a verdict in favor of plaintiffs on five of those, finding violations on July 12, 1989; July 13, 1989; August 22, 1989; September 26, 1990; and April 15, 1991.

C. The District Court's Decision

The district court subsequently granted defendants judgment as a matter of law on all five alleged CWA violations. App., *infra*, 54a. The district court determined that Southview did not violate the CWA because it was not a point source of the alleged pollution. Because the CWA applies only to discharges from a point source, the court could not, as a matter of law, sustain the verdict.

With regard to the July 13 date, the court held that Southview could not be liable because the alleged discharge had not been from a point source but from "diffuse runoff," which is "not the sort of pollution that Congress intended to be covered by the Act." App., *infra*, 45a. As to the September 26 and April 15 dates, the court found overwhelming evidence that the manure had been washed off Southview's fields by heavy rains, making the occurrences "agricultural stormwater discharges" exempted by Congress from the definition of a point source in 1987. *Id.* at 35a-36a. Regarding the July 12 and August 22 dates, the district court found insufficient evidence that there had been any discharges at all, so that the jury's finding was "sheer surmise and conjecture." *Id.* at 28a.

Finally, the court held that Southview is not a CAFO point source because it grows crops on its facility, taking it out of the regulatory definition. App., *infra*, 36a n.6.

D. The Court of Appeals' Decision

Reversing, the Second Circuit rested its conclusion that all five discharges emanated from a point source on its holding that Southview is a CAFO and not subject to any agricultural exemption. App., *infra*, 20a. To begin with, the court ruled that the regulatory exemption from the definition of CAFO for a "lot" or "facility" on which crops are grown did not apply here. It was able to reach this conclusion only by defining "facility" extremely narrowly as the barns in which the cattle were kept rather than as the farm as a whole. The court thus held that the exemption would apply only if Southview's crops were grown "in" the barns, rather than, as was the case here, "adjacent" to them. *Id.* at 18a-20a.

In addition, the court of appeals held that the statutory exemption for agricultural stormwater discharges did not apply to the September 26 and April 15 occurrences, as the district court had concluded, because "there can be no escape

from liability for agricultural pollution simply because it occurs on rainy days." App., *infra*, 13a. The court of appeals also found that Southview failed a test—one of the court's own invention and not based on any statutory language—according to which the exemption does not apply if "sufficient quantities" of agricultural pollutants are present in the stormwater runoff. *Id.* at 15a.

Finally, overriding the district court's contrary factual determinations, the Second Circuit held that there was sufficient circumstantial evidence to find that discharges occurred on July 12 and August 22, and that the discharge on July 13 did emanate from a point source—either a swale in one of the fields or, alternatively, Southview's manure spreading vehicles. App., *infra*, 12a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to review the court of appeals' serious misconstruction of the term "point source" in the CWA. In vastly expanding the reach of the CWA into American agriculture, the court of appeals effectively overruled Congress' exemption of most agricultural activities, including fertilization, from the definition of "point source" and thus from the CWA's burdensome federal permit program. In so doing, it impermissibly departed from the accepted and proper scope of statutory interpretation.

The issues presented in this petition are of critical importance to the American agricultural industry. The court of appeals' ruling threatens to add a significant new layer of regulatory costs and compliance requirements to the heavy demands already imposed upon the beleaguered agricultural sector. It imperils the livelihoods of farm and ranch families who heretofore have reasonably understood that their activities fall within Congress' carefully crafted exemptions.

I. THE SECOND CIRCUIT'S DECISION IMPERMISSIBLY OVERRODE CONGRESS' DETERMINATION TO HAVE THE STATES—NOT THE FEDERAL GOVERNMENT—REGULATE NONPOINT SOURCES OF POLLUTION

The CWA embodies a dual regulatory system for safeguarding the nation's waters from pollution. It carefully distinguishes between "point source" and "nonpoint source" pollution. The former is restricted to pollution from a "discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). The latter is not defined, but the EPA has stated that "nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from *land runoff*, precipitation, atmospheric deposition, or percolation." U.S. EPA, Office of Water, *Nonpoint Source Guidance* 3 (1987) (emphasis added).

The CWA assigns oversight over pollution emanating from point sources to the federal government and oversight over pollution emanating from nonpoint sources to the states. Thus, "[i]n 1972, the Congress made a clear and precise distinction between point sources, which would be subject to direct Federal regulation, and nonpoint sources, control of which was specifically reserved to State and local governments." S. Rep. No. 370, 95th Cong., 1st Sess. 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4334. The federal government regulates discharges of pollutants from point sources by mandating technology-based standards and requiring those who discharge pollutants to obtain permits issued pursuant to NPDES. 33 U.S.C. § 1342. CWA sections 208 (33 U.S.C. § 1288) and 319 (*id.*, § 1329) direct the states to adopt measures to address nonpoint source pollution, with the details of those measures to be developed and administered by the states themselves. See *Arkansas* v. *Oklahoma*, 112 S. Ct. 1046, 1054 (1992).

Congress has taken pains to ensure that most agricultural activity is considered to be nonpoint source and hence is subject primarily to state regulation.[1] First, by defining "point source" as "a discrete conveyance," Congress automatically excluded most agricultural contamination, which "enter[s] the aquifer over a broad area, rather than from a discrete point of discharge." Sivas, *Groundwater Pollution from Agricultural Activities: Policies for Protection*, 7 Stan. Envtl. L.J. 117, 128 (1987/1988). The Senate Report to the 1972 amendments thus specifically listed as nonpoint sources "[a]gricultural runoff, animal wastes, soil erosion, fertilizers, pesticides and other farm chemicals that are a part of runoff." S. Rep. No. 414, 92d Cong., 1st Sess., *reprinted in* 1972 U.S.C.C.A.N. 3668, 3705.

Second, Congress has consistently exempted agricultural livestock operations from the requirements imposed on point sources, excepting only CAFOs. See 33 U.S.C. § 1362(14); S. Rep. No. 414 at 3759 (supplemental views of Sen. Dole) ("Most of the problems of agricultural pollution deal with non-point sources * * *; a feedlot would be considered to be a non-point source").

Third, Congress reinforced agriculture's special status by amending the CWA's definition of point source in 1977 specifically to exclude "return flows from irrigated agriculture," thereby overturning a contrary court ruling, *National Resources Defense Council* v. *Train*, 396 F. Supp. 1393 (D.D.C. 1975), aff'd sub nom. *National Resources Defense Council* v. *Costle*, 568 F.2d 1369 (D.C. Cir. 1977). The 1977 amendments also added the Rural Clean Water

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[1] The Second Circuit has previously recognized that point sources are generally found in the context of industrial and municipal—not agricultural—discharges. *United States* v. *Plaza Health Labs., Inc.*, 3 F.3d 643, 646-647 (2d Cir. 1993).

Program, which offered financial incentives to control agricultural nonpoint source pollution. 33 U.S.C. § 1288(j).

Fourth, Congress amended the definition of point source yet again in 1987 to exempt agricultural—but not industrial—stormwater discharges. See 33 U.S.C. § 1362(14). The 1987 amendments further manifested Congress' commitment to state regulation of nonpoint sources by adding section 319 to the CWA, 33 U.S.C. § 1329, which encourages states to control nonpoint source pollution.[2] Together, these actions demonstrate that Congress regards agriculture as a special case under the CWA and as generally exempt from the federal regulation of point sources. *Cf. Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 18 (1981) (construing sections of Clean Water Act by analyzing its structure and legislative history; "courts are not authorized to ignore this legislative judgment").

The Second Circuit's decision in this case transforms Congress' dual regulatory scheme into a monolithic program of federal regulation. By construing the concept of a CAFO so broadly that all large livestock operations become point sources, and by effectively defining the "agricultural stormwater discharges" exemption out of existence, the court of appeals has engaged in the kind of "judicial legislation under the guise of construction" (*Blockburger* v. *United States*, 284 U.S. 299, 305 (1932)) against which our constitutional scheme was designed as a bulwark.

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[2] Significantly, *every* case outside the Second Circuit cited by the court of appeals to support its position was decided *before* Congress' 1987 amendments.

A. Farms Like Southview Are Not Concentrated Animal Feeding Operations And Are Excluded From The Definition Of A Point Source

The Second Circuit's reversal of the district court rests in large measure on its determination that Southview is a CAFO and therefore a point source. App., *infra*, 20a. It could reach that conclusion only by so twisting the regulatory definition of CAFO as to turn it inside out.[3]

The CWA's definition of point source is, with one exception, directed at industrial and municipal rather than agricultural polluters. S. Rep. No. 414 at 3760; U.S. EPA, Office of Water, *Managing Nonpoint Source Pollution* 144 (1992). Except for CAFOs, "most water pollution generated by agricultural activities is nonpoint source." Gould, *Agriculture, Nonpoint Source Pollution, and Federal Law*, 23 U.C. Davis L. Rev. 461, 474 (1990). The statute itself does not define a "CAFO," but the express language and the statutory scheme outlined above strongly suggest that Congress did not intend to include conventional farms like petitioner Southview, but only factory-like operations where livestock are simply held for feeding and fattening prior to slaughter. Concentrated animal production without crop activity has long been viewed as more industrial than agricultural. See *Farmegg Prods., Inc.* v. *Humboldt County*,

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[3] The Second Circuit's error may have a simple explanation. The question whether Southview is a CAFO was never subject to adversary briefing in the court of appeals. That issue was raised for the first and only time in an *amicus* brief filed by the United States *three working days* before oral argument—well after all the parties' briefs had been submitted. The court of appeals denied Southview's motion for leave to file a supplemental brief in response to the government's new arguments. The court of appeals therefore lacked the benefit of a full exchange of views, as well as any references to the trial testimony and relevant exhibits, before determining that Southview is a CAFO.

190 N.W.2d 454, 459 (Iowa 1971) (land used for poultry production where no feed crops are grown is not for "agricultural purposes"). Accordingly, the regulatory definition of CAFO excludes lots and facilities that, in addition to maintaining livestock, also grow crops, vegetation, forage growth, or post-harvest residues. 40 C.F.R 122.23(b).

That is the sole CAFO criterion at issue here. For Southview to be a CAFO, crops or vegetation must not be grown "over any portion of the lot or facility." 40 C.F.R. 122.23(b). The use of the disjunctive "or" indicates that "facility" means something different from, and obviously broader than, "lot." And the phrase "any portion of" indisputably indicates that crop-growing need not be a major activity to remove the facility from CAFO status. Southview, it is uncontested, grows crops over a significant portion—more than 1,100 acres—of its facility, in fields abutting and surrounding the cattle barns. In consequence, it is not a CAFO.

The court of appeals was able to overcome this stubborn fact only by narrowing the broad term "facility" to mean solely the barns in which the cattle are penned. Finding that Southview grows crops on fields "adjacent" to those barns, rather than "in" the barns, the court concluded that Southview is a CAFO. App., *infra*, 18a-20a.[4] In the court's view, then, for a large livestock farm not to be a CAFO and thus not a point source, *it would have to grow crops inside its barns!*[5] Congress could not possibly have

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[4] Significantly, the term "adjacent" is not found in any of the pertinent statutory or regulatory provisions.

[5] Another option might be to keep the cows at pasture with no housing at all. But that is not practical for most of the year in cold weather climates like upstate New York and most other dairy and livestock regions. Moreover, modern dairy farms have largely

intended such an absurd qualification. The Second Circuit's extraordinarily crabbed construction would do irreparable violence to Congress' goal of leaving regulation of agricultural pollution to the states. It would transform a narrow window of direct federal regulation in the agricultural arena into an enormous expansion of CWA liability reaching all large dairy and livestock farms.

Furthermore, even EPA has acknowledged that the term "facility" is much broader than the Second Circuit believed, recently stating that "[t]he definition [of a CAFO] does not include areas of the facility where crops or forage crops are maintained throughout the growing season." 58 Fed. Reg. 7610, 7616 (1993). This statement plainly assumes that the term "facility" describes an entire farm, including crop-growing areas. It also clarifies that the crop fields—the direct source of the pollution alleged in this case—are not CAFOs and thus cannot be point sources for CWA purposes.[6] Moreover, EPA's regulations allow its Director to "designate any animal feeding operation as a concentrated animal feeding operation upon determining that it is a significant contributor of pollution." 40 C.F.R. § 122.23(c)(1). The Director has not designated Southview as a CAFO.

The court of appeals clearly was dissatisfied with the regulatory definition of CAFO. But "[t]he question * * * is

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abandoned pasturage because it cannot provide a sufficient volume of adequate nutrients for milk production.

[6] The court of appeals' ruling was based on wholly different EPA regulations that define "feed lot" in the context of setting forth effluent limitations for feed lots with NPDES permits. App, *infra*, 18a; see 40 C.F.R. § 412.12. If anything, those regulations merely illustrate the difference between the narrow concept of a "feed lot" and the much broader concept of an agricultural "facility."

not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for these regulations." *E.I. du Pont de Nemours and Co.* v. *Train*, 430 U.S. 112, 138 (1977). The definition of CAFO in the regulations is consistent with the very restricted opening provided by Congress to bring agricultural enterprises within the reach of the NPDES permit program. The Second Circuit's opinion failed to respect Congress' creation of broad exemptions to the CWA for agriculture, or even EPA's own regulations. See *EPA* v. *State Water Resources Control Bd.*, 426 U.S. 200 (1976) (court of appeals' misreading of Clean Water Act led it improperly to require federal facility to obtain state permit).

B. Congress Expressly Exempted Agricultural Stormwater Discharges From The Definition Of Point Source

Overwhelming evidence supported the district court's ruling that the discharges of September 26 and April 15 were agricultural stormwater discharges as a matter of law and thus did not issue from a point source. The uncontroverted testimony from witnesses was that manure from the Southview fields had migrated off the property after rainstorms on each of those dates. In addition, two reports prepared by the New York State Department of Environmental Conservation, admitted into evidence, stated that "heavy rain" "caused" the manure to run off the property on each of those dates. App., *infra*, 30a.[7] Thus, the district court could only conclude that "[i]f this activity does not fall within the exception for

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[7] The Second Circuit's supposition that "the run-off was primarily caused by the over-saturation of the fields rather than the rain" (App., *infra*, 15a) ignored these reports of the local on-the-scene officials and impermissibly substituted its own unsubstantiated factfinding for the findings of the district court that had heard all the evidence.

agricultural stormwater discharges, it is difficult to see what would." *Id.* at 35a-36a.

Congress specifically exempted agricultural stormwater discharges from the definition of point source in the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7. Although the legislative history provides no explanation of the term, that undoubtedly reflects the lack of any need to explain such plain language. "Agricultural stormwater discharges" is a clear enough and broad enough description to encompass any agricultural pollution picked up by rainstorm runoff. Congress did not say "some" agricultural stormwater discharges; it exempted all. The EPA understood this when it prepared its implementing regulations (40 C.F.R. § 122.3), which state:

> The following discharges do not require permits: * * * (e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands.

The runoff from Southview's "cultivated crops" fits within this exclusion. Furthermore, the EPA recently clarified the meaning of a stormwater discharge by explaining that it is "runoff caused by rainfall * * * which flows overland" rather than seeps into the soil (58 Fed. Reg. 7610, 7614 (1993))—an exact description of the occurrences at Southview on September 26 and April 15. Unsurprisingly, commentators agree that farm field runoff is not a point source. *E.g.*, Davidson, *Thinking About Nonpoint Sources of Water Pollution and South Dakota Agriculture*, 34 S.D. L. Rev. 20, 21 (1988/1989) ("runoff from land" is a nonpoint source).

Dissatisfied with Congress' blanket exclusion of agricultural stormwater runoff, the court of appeals proceeded to subclassify runoffs and to hold some to be point

sources. It ruled that if "sufficient quantities" of manure were present in the runoff, it "could not be classified as 'stormwater.'" App., *infra*, 15a. Not only did the court fail to identify how "sufficient" those quantities had to be, but it nowhere even pretended to ground its "sufficient quantities" test in the text of the statute or regulations. The Second Circuit's "sufficient quantities" test amounts to a judicial device to rescind this unqualified Congressional exemption and substitute a judge-made rule.[8]

The court of appeals ruled that "there can be no escape from liability for agricultural pollution simply because it occurs on rainy days." App., *infra*, 13a. The fact is, however, that Congress' policy judgment was precisely to the contrary—that agricultural wastes washed into navigable waters on rainy days would not be subject to CWA liability. See Davidson, *supra*, 34 S.D. L. Rev. at 36 ("the word 'stormwater' [in the 1987 amendment] describes *all* the waters that routinely drain from farm fields") (emphasis added). Recognizing that rainwater cannot travel across fertilized farm land without picking up some level of pollutants, Congress authored the term "agricultural stormwater discharges" to describe broadly such mixtures and thereby remove any disincentive to fertilize. See App., *infra*, 34a (noting that it is "virtually impossible for rain water to travel over the ground without picking up at least a minimal amount of pollutants"). The position of the Second

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[8] The court of appeals went on to urge that because *all* discharges eventually mix with precipitation runoff when they *reach* the relevant navigable waters, Congress could not have intended to exempt all such mixtures. App., *infra*, 14a. Here, the court simply mistook the relevant locus of analysis. The issue is whether the manure and stormwater mixed *on* the farm, forming agricultural stormwater, and then "discharged" into navigable waters—not what occurred *in* the navigable waters.

Circuit, if allowed to stand, would effectively wipe the 1987 agricultural stormwater discharges amendment off the books.

This petition does not rest on a circuit split over this question. In fact, the conflicting lower court opinions in this case are the only ones to have construed Congress's 1987 exemption of agricultural stormwater discharges from the definition of point source. For that very reason, the Second Circuit's revision of that amendment now occupies the field and threatens to cause severe disruption to farm and ranch interests across the nation. This Court should grant certiorari to dispel the confusion that results from that decision.

C. Neither a Depression In A Southview Field Nor Its Manure-Spreading Vehicles Were Point Sources Because Neither Discharged Pollutants Into Navigable Waters

Judge Oakes, author of the Second Circuit opinion, has previously recognized that agricultural runoff of the type at issue here is nonpoint source pollution. See *United States* v. *Plaza Health Labs., Inc.*, 3 F.3d 643, 652 (2d Cir. 1993) (Oakes, J., dissenting) ("Nonpoint source pollution is, generally, runoff: * * * agricultural chemicals from farmlands, * * * other substances washed by rain, in diffuse patterns, over the land and into navigable waters"). In this case, however, the court located point sources all over Southview's crop fields. In particular, the court held that either a swale in one of Southview's fields or, "alternatively," its manure spreading vehicles, were point sources. App., *infra*, 10a. Neither were what Congress had in mind.

A swale is nothing more than a depression in the ground—hardly the man-made discrete conveyance contemplated in the statutory definition of point source. The court's own description illustrates that any gathering of manure in the swale was much too remote from the alleged discharge to be its source. According to the court, the manure left the swale, found its way to a pipe under a

stonewall, then ran into a ditch, then ran into a stream, and eventually made its way to the Genesee River. App., *infra*, 8a. As the district court correctly determined, this meandering movement from "low spots" on the Southview Farm took place "in too diffuse a manner" to constitute a point source discharge. *Id.* at 46a.

Even more indirect was the connection between Southview's manure-spreading equipment and the eventual discharge. The equipment applied the manure to the fields. Only later, through natural processes, did some of the manure allegedly collect in the swale and begin its extended journey. The involvement of the equipment was thus even more remote from any eventual discharge than that of the swale. Moreover, if, as all the authorities except the Second Circuit agree, agricultural runoff is nonpoint source, then the court's conclusion must mean that the equipment was a point source of nonpoint source runoff. The CWA's permit requirement applies, however, only to point sources of discharges into navigable waters. Southview's manure spreading vehicles were out of the picture long before any such discharges took place, and they cannot be sources of liability.

D. Sections 208 And 319 Of The Clean Water Act Assign Regulation Of Nonpoint Sources Of Pollution To The States

The Second Circuit's opinion disrupts a settled Congressional design leaving regulation of nonpoint sources of water pollution to the states. "[T]he Clean Water Act establishes distinct roles for the Federal and State Governments." *PUD No. 1 of Jefferson County* v. *Washington Dept. of Ecology*, 114 S. Ct. 1900, 1905 (1994). In contrast to the heavy federal involvement in regulation of point sources through the NPDES permit program, "the federal government leaves the control of non-point source pollution largely to the states." Gould, *supra*, 23 U.C. Davis L. Rev.

at 472. See also Fentress, *Nonpoint Source Pollution, Groundwater, and the 1987 Water Quality Act: Section 208 Revisited?*, 19 Envtl. L. 807, 808 (1989) (CWA left "regulation of nonpoint sources to the states"); Davidson, *supra*, 34 S.D. L. Rev. at 44 ("Congress * * * has largely deferred to the states" regarding nonpoint source management). Congress deferred to the states primarily by enacting CWA sections 208 and 319.

Congress enacted section 208 to create a "laboratory for new institutional control mechanisms for vexing nonpoint source problems." S. Rep. No. 414, at 10. Section 208 directs state governors to identify water pollution problems, select representatives to develop area-wide management plans, and designate agencies to implement them. 33 U.S.C. § 1288. Although plans must be approved by the EPA, federal involvement is designed to be minimal. Section 319 added a detailed nonpoint source management program to the CWA in the Water Quality Act of 1987. It strengthened the role of the states by requiring them to submit detailed reports to the EPA on their assessments of and management plans for controlling nonpoint source pollution. 33 U.S.C. 1329. See U.S. EPA, Office of Water, *Managing Nonpoint Source Pollution* (1992).

Congress specifically intended that agricultural runoff of the type at issue here would be regulated by the states, not by the federal NPDES program. The 1972 Senate Report, explaining its definition of "point source," stated that "[t]he control of pollutants from runoff is applied pursuant to section [208] and the authority resides in the State or other local agency." S. Rep. No. 414, *reprinted in* 1972 U.S.C.C.A.N. at 3774. Indeed, section 208 specifically requires the state-developed plans to address agriculturally related nonpoint source pollution, *including runoff from manure disposal areas*. 33 U.S.C. § 1288(b)(2)(F).

The EPA has itself recently indicated that runoff from land application of manure does not implicate NPDES: "While the program can move manure into a controlled storage structure, no farmer is specifically required to undertake further BMPs [Best Management Practices] when the manure is taken out of storage. Therefore, the farmer can encourage runoff of these wastes by applying them to cropland at rates that exceed crop uptake." U.S. EPA, Office of Water, *Managing Nonpoint Source Pollution*, *supra*, at 189. See also Noble & Looney, *The Emerging Legal Framework for Animal Agricultural Waste Management in Arkansas*, 47 Ark. L. Rev. 159, 171 (1994) ("Congress and the EPA, at the national level, did not intend for the NPDES program to extend to land application sites that are a part of an agricultural operation"). The court of appeals' decision undermines this widely held and widely relied upon understanding.

Congress' policy reasons for delegating to the states the primary control over nonpoint source pollution, including that from agriculture, are easily discerned. Point sources "are end-of-the-pipe discharges that are easy to regulate" under the NPDES permit program. U.S. EPA, Office of Water, *Nonpoint Source Solutions* 4 (1989). Nonpoint sources, however, "are harder to identify and control [and] depend upon localized features such as land uses, climate, and geology." Letson, *Point/Nonpoint Source Pollution Reduction Trading: An Interpretive Survey*, 32 Nat. Resources J. 219, 220 (1992). Thus, the "site-specific nature" of the problem renders local control more cost-effective. *Ibid.* In addition, the technology-based federal standards may be too inflexible to manage the diversity of nonpoint source problems. Finally, because "agricultural wastes are not concentrated in effluent pipes or exhaust stacks," to regulate them in the same manner as point source discharges would be both "unenforceable" and "nonsensical." Sivas, *supra*, 7 Stan. Envtl. L.J. at 159. Thus,

there was good reason for Congress to allot control over most agriculture-based pollution to the states. This division of responsibilities also was consistent with the CWA's underlying policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 101(b). See *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597 (1991) (regulation of pesticide spraying a matter of state, not federal, law).

The court of appeals acknowledged the CWA's delegation to the states of control over nonpoint source pollution, but it proceeded to ignore the CWA's clear mandate that state control applies to all nonpoint source pollution, including manure runoff. By insisting that Southview is a CAFO, and that the agricultural stormwater runoff exemption had no application here, the Second Circuit managed to throw into question this entire statutory scheme, at least as applied to large dairy and other livestock farms. Whether or not New York was doing an adequate job of controlling manure runoff and other nonpoint source pollution is not at issue here. What is at issue is the court of appeals' overreaching into the legislative domain. This Court should intervene to return the regulation of non-point sources to the states.

II. THE COURT OF APPEALS' DECISION WILL RENDER MANURE FERTILIZATION UNECONOMICAL AND DELIVER A DEVASTATING BLOW TO ALREADY BELEAGUERED FARMERS AND RANCHERS

Few dairy farms today rely on pasturage to feed their mature livestock. Modern farms like Southview recycle their manure. They spray the liquid extract and spread the solids on their crop fields in a program of organic fertilization. Not only is this process economically efficient, but it reduces evnironmental exposure to the deleterious effects of chemical

fertilizers. See Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 Neb. L. Rev. 210, 239 (1993) ("agricultural practices which protect the environment while preserving the profitability of farmers [include] using animal wastes for fertilizer"). Fertilization in this manner may also protect against contamination of groundwater by seepage of consolidated animal wastes. See Sivas, *supra*, 7 Stan. Envtl. L.J. at 126.

By transforming all large dairy farms into CAFOs and thus into potential point sources of water pollution—then compounding the problem by gutting the agricultural stormwater exemption—the court of appeals' decision will likely force all large dairy and livestock farms to assume the considerable costs associated with compliance with federal regulation. Application fees, inspection mandates, potential CWA fines and damages, legal fees, bureaucratic paperwork, time lost to comply—all these costs will either make farming less profitable and thus less desirable as a livelihood and investment, or will drive up the prices charged consumers for basic dairy foods like milk, butter, and cheese. The Second Circuit's ruling will not only increase the costs of farming, but may also discourage farmers from recycling their animal wastes. Moreover, the availability of agricultural credit, already a significant problem, will worsen as lenders worry about their own potential CWA liability. See *Kelley* v. *EPA*, 15 F.3d 1100, 1107 (D.C. Cir. 1994) (holding that lenders may be held liable under CERCLA).

After all, there is nothing particularly unique about Southview's application of liquid manure to its crop fields as opposed to similar activities performed on a daily basis all over rural America. If Southview's manure fertilization violated the CWA, so do the endeavors of myriad other farmers. The court of appeals' decision is thus likely to render modern farmers' sensible utilization of agricultural wastes economically unviable. At a minimum, it will make farming a less desirable livelihood and further the already

considerable flight from the land. See *West Lynn Creamery, Inc.* v. *Healy*, 114 S. Ct. 2205, 2221 (1994) (Rehnquist, C.J., dissenting) (noting that "beleaguered dairy farmers" are "beset by steady or declining prices and escalating costs"); Pins, *25% Quit Farming in 1980's*, Des Moines Reg., May 22, 1992, at 1A.

Congress has determined that such routine agricultural activities are not to be federally regulated in the same manner as industrial and municipal enterprises. That determination was the result of a host of complex policy considerations—including the difficulty of federal oversight of agriculture-based pollution, the superior capacity of the states to devise balanced programs and to experiment with alternative solutions, and the desirability of protecting farmers and the agricultural sector of our society from costly regulation. As the EPA has expressed it, the "diffuse" character of nonpoint source discharges (like the runoff at issue here) engenders "different problems" and requires "different political science," "different social science," and "different science." U.S. EPA, Office of Water, *Nonpoint Source Solutions* 4 (1989). This Court should grant certiorari to ensure that this comprehensive federal policy is not overthrown by a poorly considered decision that will have nationwide impact.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT; Philip Karcheski; Kathleen Karcheski, Individually and as Parents and Legal Guardians of Brian Karcheski and Robyn Karcheski, Infants; Lois E. Link; Daniel L. Wilson; William A. Fagan; Betty C. Fagan; Jeffrey Ferris; Linda Ferris, Individually and as Parents and Legal Guardians of Chad J. Ferris, Stacey P. Ferris and Shawn W. Ferris; Kirk Schroeder, Individually and as Parent and Legal Guardian of Stacy L. Schroeder; Kirk Bly and Vickie Bly, Plaintiffs-Appellants,

v.

SOUTHVIEW FARM and Richard H. Popp, Defendants-Appellees.

No. 1608, Docket 93-9229.

United States Court of Appeals,
Second Circuit

Argued May 16, 1994.

Decided Sept. 2, 1994.

Before: OAKES and MINER, Circuit Judges, and CARTER, Senior District Judge.*

OAKES, *Senior Circuit Judge*:

This is a citizen's suit under the Clean Water Act of 1977, 33 U.S.C. §§ 1251 et seq. (1988 & Supp. IV 1992),

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* The Honorable Robert L. Carter, Senior District Judge, Southern District of New York, sitting by designation.

("CWA" or the "Act"), with some state law claims for nuisance, negligence and trespass. The suit arises on account of the liquid manure spreading operations of a large dairy farm in western New York. After denial of a motion to dismiss the complaint and of a motion for summary judgment, the case proceeded to jury trial. See *Concerned Area Residents for the Env't* v. *Southview Farm*, 834 F.Supp. 1410 (W.D.N.Y. 1993) ("CARE I"). Following a jury verdict in plaintiffs' favor on five CWA violations and the state law trespass claim, the United States District Court for the Western District of New York, David Larimer, Judge, granted judgment to the defendants as a matter of law on the five CWA violations. *Concerned Area Residents for the Env't* v. *Southview Farm*, 834 F.Supp. 1422 (W.D.N.Y. 1993) ("CARE II"). The court left standing the verdict and damages of $4,101 on the trespass count. CARE II, 834 F.Supp. at 1435-37.

The appeal by plaintiffs involves only the five CWA violations and raises anew the question what is a "point source" within the meaning of 33 U.S.C. § 1362(14), a question this court touched upon in *United States* v. *Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993) (holding that, for purposes of criminal liability, a human being is not a point source under the CWA), cert. denied, ___ U.S. ____, 114 S.Ct. 2764 (1994). The appeal also concerns whether the liquid manure spreading operations fell within the "agricultural stormwater discharges" exception to point source discharges under the Act. 33 U.S.C. § 1362(14).

We now hold that the liquid manure spreading operations are a point source within the meaning of CWA section 1362(14) because the farm itself falls within the definition of a concentrated animal feeding operation ("CAFO") and is not subject to the agricultural exemption.

I. Background

Plaintiffs, who refer to themselves collectively as Concerned Area Residents For the Environment ("CARE"), are a group of land owners who live near Southview Farms, a dairy farm in the town of Castile, in Wyoming County, New York. Defendants are the farm itself, and Richard H. Popp, an individual. Southview Farm is one of the largest dairy farms in the State of New York. It employs twenty-eight full-time and nine part-time employees. As of 1992, it owned 1,100 crop acres and had an animal population of 1,290 head of mature cows with over 900 head of young cattle, heifers and calves, making a total of 2,200 animals.

Unlike old-fashioned dairy farms, Southview's operations do not involve pasturing the cows. Instead, the cows remain in their barns except during the three times per day milking procedure. Also unlike old-fashioned dairy farms where the accumulated manure was spread by a manure spreader, Southview's rather enormous manure operations are largely performed through the use of storage lagoons and liquid cow manure. The storage lagoons number five on the main farm property ("A Farm"). One four-acre manure storage lagoon has a capacity of approximately six-to-eight million gallons of liquid cow manure.

In connection with this particular manure storage lagoon, Southview has installed a separator which pumps the cow manure over a mechanical device which drains off the liquid and passes the solids out through a compressing process. The solids that remain are dropped into bins for transport while the liquid runs by gravity through a pipe to the four-acre manure storage lagoon. This separated liquid was apparently used for the purpose of washing down the barns where the cows are housed.

Insofar as application of the manure as fertilizer to the land is concerned, there is a center pivot irrigation system for spreading liquid manure over the fields. The diameter of the

circle of this irrigation system can be modified to conform to the field on which the application is being made. A series of pipes connects the pivot to the liquid manure storage lagoons. The pivot is self-propelled with the height of the arc from the manure spray being somewhere between 12 and 30 feet.

Southview also spreads its manure with a hard hose traveler which is a long piece of plastic tubing on a large reel. The traveler can be unwound and has a nozzle on the end which can send liquid manure 150 feet in either direction making a 300-foot-wide swath for purposes of fertilizing farm fields. The height of the arc from the projected spray is "a couple of feet higher" than that of a center pivot irrigator. Since 1988, a piping system consisting of a six-inch aluminum pipe and running under both the state highway and a town road to a lagoon on at least one Southview Farm other than the "A Farm," has transported liquid manure from the storage lagoon to various locations without the use of vehicles.

Southview also uses conventional manure spreading equipment including spreaders pulled by tractors and self-propelled vehicles which, generally speaking, have a 5,000 gallon capacity for liquid manure. These vehicles were used to spread manure from the smaller lagoons on the "A Farm" which do not receive liquid manure processed through the separation system. Southview's manure spreading record reflects the application of millions of gallons of manure to its fields.

II. Procedural Posture

On May 9, 1990, the plaintiffs notified Southview Farms and Richard H. Popp that they intended to sue the defendants for violations of federal and state environmental laws in connection with Southview's manure operations. (Letter of 5/9/90 from Alan J. Knauf, attorney for CARE, to Richard H. Popp.) On January 22, 1991, the plaintiffs filed the original complaint. Complaint, *CARE* v. *Southview Farms*,

No. 91-6031 (W.D.N.Y. filed January 22, 1991) ("Original Complaint") and on May 31, 1991, they filed an amended complaint. Complaint, *CARE* v. *Southview Farms*, No. 91-6031 (W.D.N.Y. filed May 31, 1991) ("Amended Complaint").

On May 19, 1993, after a three-week trial commencing April 26, 1993, the eight-person jury returned a verdict in favor of the plaintiffs on five of the eleven CWA violations which had been submitted to the jury for its consideration. On July 1, 1993, the defendants filed a motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b). On October 19, 1993, the court granted in part the defendants' Fed.R.Civ.P. 50(b) motion for judgment as a matter of law ("judgment m.o.l.," formerly judgment notwithstanding the verdict or "judgment n.o.v."), CARE II, 834 F.Supp. at 1437, and a final judgment was entered thereafter.

On November 18, 1993, the plaintiffs timely filed a notice of appeal. This court has jurisdiction under 28 U.S.C. § 1291 (1988).

III. Standard of Review

The moving party bears a heavy burden to prevail on its motion for judgment m.o.l. Fed.R.Civ.P. 50(b); *Stubbs* v. *Dudley*, 849 F.2d 83, 85 (2d Cir. 1988), cert. denied, 489 U.S. 1034 (1989). In ruling on such a motion, the court must "consider the evidence in the light most favorable to the [non moving party] and . . . give that party the benefit of all reasonable inferences that the jury might have drawn in [its] favor from the evidence." *Smith* v. *Lightning Bolt Productions, Inc.*, 861 F.2d 363, 367 (2d Cir. 1988). To grant a judgment m.o.l., the court must find that there is "'such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or . . . such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against

[it].'" *Song* v. *Ives Lab., Inc.*, 957 F.2d 1041, 1046 (2d Cir. 1992) (quoting *Mattivi* v. *South African Marine Corp., "Huguenot"*, 618 F.2d 163, 168 (2d Cir. 1980)).

IV. Discussion

The CWA provides that, absent a permit and subject to certain limitations, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a); see Plaza Health, 3 F.3d at 645. A pollutant includes "solid waste, . . . sewage, . . . biological materials, . . . and agricultural waste discharged into water" and thus includes the manure in this case. 33 U.S.C. § 1362(6). A "discharge" is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The term "point source" includes "any discernible, confined and discrete conveyance, including but not limited to any . . . concentrated animal feeding operation. . . . This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14). Our basic questions on review then are whether the defendants discharged the manure pollutant from any point source into navigable waters and whether the agricultural stormwater exemption or any other limitation applies.

The plaintiff-appellants' contentions relate to five specific CWA violations which the jury found but the district court overturned on the defendants' motion for judgment m.o.l. These specific violations are as follows:

(1) A July 13, 1989, violation on field 104 on the so-called Wyant Farm, located to the east of Middle Reservation Road and bordering on Letchworth State Park through which the Genesee River runs. As to this violation, two of the plaintiffs observed liquid manure flowing into and through a swale on the Wyant Farm and through a drain tile leading directly into a stream which ultimately flows into the Genesee River.

(2) July 12, 1989, and August 22, 1989, violations as to which the district court concluded that the jury finding of a discharge was "sheer surmise and conjecture." While the district court concluded that there was a "complete absence of substantial evidence supporting the verdict," the appellants argue that there is strong circumstantial evidence adequately supporting the jury's conclusion with respect to these violations.

(3) September 26, 1990, and April 15, 1991, violations as to which the appellants claim that the district court erroneously set aside the jury verdicts because no reasonable juror could find that the discharges were not excepted under the Act as agricultural stormwater discharges.

It is at this point that the United States amicus position and the position of the appellants tend to coincide, if not directly meet. It is significant to note, as previously stated, that the cows are not put out to pasture. The fields to which the manure is applied, as above indicated, are used for crops. The United States appears as amicus curiae in support of the appellants on the basis that, because the Southview operations involve more than 700 cattle, it is a facility which is defined in the regulations under the Act as a CAFO, and therefore one type of "point source" under the Act, thereby requiring a permit for discharges which was not obtained in this instance. As we have stated, the Act defines the term "point source" as including "any . . . concentrated animal feeding operation." 33 U.S.C. § 1362(14). In this connection, the district court concluded that, as a matter of law, Southview was not a CAFO because crops are grown on a portion of the farm. The United States contends that Southview is a CAFO as a matter of law because crops are not grown in the feed lot in which the milking cows are confined.

In the following discussions we explore the appellants' contentions in turn and then discuss the United States' position as amicus with respect to the September 26, 1990,

and April 15, 1991, CWA violations which is opposed by the New York State Farm Bureau as amicus.

A. July 13, 1989, Violation on Field 104

The July 13 violation, found by the jury but overturned by the district court, as we have said, occurred on field 104 on the Wyant property which shares the boundary line with Letchworth State Park. Field 104 contains a slew or swale which tends to collect liquid manure spread by Southview's tankers and conveys it through a pipe in a stonewall and through the stonewall itself into a ditch which runs for some length on the Southview property before it reaches the boundary of the state park.

On July 13, 1989, appellants Kirk Bly and Philip Karcheski observed the manure collecting in the slew or swale and flowing into the ditch which in turn flowed off of the Southview property into Letchworth State Park property, and, in turn, joined a stream which ultimately flowed into the Genesee River. (Transcript of 4/30/93 at 9 ("Bly Testimony")); (Transcript of 4/28/93 at 6 ("Karcheski Testimony")).

The district court held and appellees contend that the July 13 discharge was not a point source discharge because the liquid simply and quite naturally flowed to and through the lowest areas of the field, and that the pollutants reached the stream that flows into the Genesee "in too diffuse a manner to create a point source discharge." The district court also suggested that the pollutants were not "collected" by human activity but in fact the opposite occurred in that the manure was dispersed over the ground.

The appellants argue that, given the testimony and the photographic evidence (reprinted in Joint Appendix at 216, 218-223) before the court, even if the liquid manure flowing from field 104 into the swale could be characterized as "diffuse run-off," as the district court characterized it, the manure pollutant was nevertheless thereafter channelled or

collected sufficiently to constitute a discharge by a point source. Alternatively, the appellants contend that the appellees' liquid-manure-spreading vehicles themselves may be treated as point sources because 33 U.S.C. § 1362(14) defines a point source to include a "container" or "rolling stock." They point out that a number of district court cases have found vehicles to be within the definition of point sources. See, e.g., *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 922 (5th Cir. 1983) (bulldozers and backhoes constitute point sources under the CWA); *United States* v. *Tull*, 615 F.Supp. 610, 622 (E.D.Va. 1983) (bulldozers and dump trucks), aff'd, 769 F.2d 182 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); *United States* v. *Weisman*, 489 F.Supp. 1331, 1337 (M.D.Fla. 1980) (bulldozers and dump trucks). They urge that by pumping the liquid manure from Southview's various lagoons into manure spreading tankers and other vehicles before discharging the liquid manure on to its various fields, Southview has "collected by human effort" the pollutant discharged into the navigable waters. See *Plaza Health*, 3 F.3d at 651 (Oakes, J., dissenting).

We agree with the appellants on both counts. We believe that the swale coupled with the pipe under the stonewall leading into the ditch that leads into the stream was in and of itself a point source. As this court has previously noted, the definition of a point source is to be broadly interpreted. *Dague* v. *City of Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991), rev'd on other grounds, ___ U.S. ____, 112 S.Ct. 2638 (1992); see also *Sierra Club* v. *Abston Constr. Co.*, 620 F.2d 41, 45-46 (5th Cir. 1980) (defendants were engaged in strip mining operations and placed their overburden in highly erodible piles which were then carried away by rain water through naturally created ditches); *United States* v. *Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (discharge from a large capacity reserve sump serving a gold extraction process could be a point source even though "the

source of the excess liquid is rainfall or snow melt"). In Sierra Club, the Fifth Circuit held that a defendant is not relieved from liability simply because it does not actually construct the conveyances "so long as they are reasonably likely to be the means by which the pollutants are ultimately deposited into a navigable body of water." *Sierra Club*, 620 F.2d at 45; see also *United States* v. *Oxford Royal Mushroom Prods., Inc.*, 487 F.Supp. 852, 854 (E.D.Pa. 1980) (discharge resulting from spraying overabundance of water onto surface of an irrigation field which, in turn, ran off into a nearby stream through a break in a berm around the field may constitute discharge from a point source). Here, the liquid manure was collected and channelized through the ditch or depression in the swale of field 104 and thence into the ditch leading to the stream on the boundary of the Southview property as it adjoins Letchworth State Park. Nothing in *Plaza Health* is to the contrary. There the court simply refused to treat a human being as a "point source" under the criminal provisions of the Act by virtue of the rule of lenity. *Plaza Health*, 3 F.3d at 649.

Moreover, we agree with the appellants that, alternatively, the manure spreading vehicles themselves were point sources. The collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point source discharges under the case law. See, e.g., *Tull*, 615 F.Supp. at 622; *Weisman*, 489 F.Supp. at 1337; *Avoyelles Sportsmen's League, Inc.* v. *Alexander*, 473 F.Supp. 525, 532 (W.D.La. 1979); see also Karcheski Testimony at 8 (testifying that, on July 12 and 13, tankers were used to spread manure onto field 104); Bly Testimony at 7-8 (same).

The district court also believed that the defendant's actions were "the kind of activity that Congress wanted to keep beyond the reach of the Act," like irrigation return flows or storm-water runoffs. Again, we disagree, for reasons that

appear below in our discussion of the position of the United States.

B. July 12, 1989, and August 22, 1989, Violations

Bly and Karcheski observed liquid manure spreading and tracked it down field and downstream on July 13, the day after they observed the spreading in the same field of "a large amount of liquid manure." In particular, Bly stated that, "on July 12, 1989," "[t]here was a racetrack type pattern in the field, and what caught my eye was a running light in the far corner of the field." Bly Testimony at 6. Bly observed Southview vehicles for several minutes and made an entry on his calendar indicating "dumping in [the] corner of [the] field, above stream, across from Wells' farm." Bly Testimony at 6-7. Karcheski on that same evening at dusk while driving on Middle Reservation Road, "noticed a light" "in the southeastern corner of [field 104]," Karcheski Testimony at 3, and returning about an hour or so later observed tanker trucks entering the Wyant Farm property via a field adjacent to field 104. Each testified that the same spreading activities were occurring on both July 12 and July 13. See Bly Testimony at 7-8; Karcheski Testimony at 7.

Similarly on August 22, 1989, both Bly and Karcheski observed Southview's vehicles spreading manure on the same field. Bly testified that "again, this is the same field, same area, and again, I noticed a heavy application of manure had been applied again." Bly Testimony at 11. Karcheski testified that "the tankers were coming down the road again and entering the same area, and I waited until they went by, and I turned around and came back." Karcheski Testimony at 8.

The district court held that the jury's finding of a discharge on July 12, 1989, and August 22, 1989, was "sheer surmise and conjecture" because the plaintiffs' offered no direct eyewitness testimony of manure actually leaving Southview

property on those dates. This finding overlooks the strong circumstantial case made out by the plaintiffs and also disregards the standard applicable to a Rule 50(b) motion for judgment m.o.l. As we stated earlier, but now stress:

> In ruling on a motion for a judgment n.o.v., the district court is required to consider the evidence in the light most favorable to the party against whom the motion was made and to give that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence. The court "'cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury.'"

Lightning Bolt Prods., 861 F.2d at 367 (quoting *Katara* v. *D.E. Jones Commodities, Inc.*, 835 F.2d 966, 970 (2d Cir. 1987) (quoting *Mattivi*, 618 F.2d at 167); see also Fed.R.Civ.P. 50(a); *Toltec Fabrics, Inc.* v. *August Inc.*, ___ F.3d ___, 1994 WL 365538, at *5 (2d Cir. July 8, 1994).

We believe that the jury was justified in inferring that the same activities that Bly and Karcheski observed in detail on July 13, 1991, probably had the same result on July 12, 1989, and August 22, 1989, namely that they were violations of the Clean Water Act at field 104. Proof of three subsequent discharges of liquid manure from the same field on April 14, 1991, April 15, 1991, and October 4, 1991, coupled with plaintiffs' trial exhibits depicting discharges which were observed and photographed on those days further buttressed the testimony of Bly and Karcheski. See Photographs (reprinted in Joint Appendix at 216, 218-23). Although those particular subsequent discharges were not included as specific point source discharges within either the amended or supplemental complaints, they provided the jury with additional evidence with which to infer that violations of the Clean Water Act did occur on both July 12, and August 22, 1989. As stated in *O'Brien* v. *Nat'l Gypsum Co.*, 944 F.2d 69, 72 (2d Cir. 1991), "it is beyond any doubt that circumstantial evidence alone may suffice to prove

adjudicative facts." See also *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960); *Tyler* v. *Bethlehem Steel Corp.*, 958 F.2d 1176, 1184 (2d Cir.), cert. denied, ___ U.S. ____, 113 S.Ct. 82 (1992). The fact that the evidence of the point source discharges "is circumstantial does not render the jury's conclusion conjectural." *In Re Joint Eastern and Southern Dists. Asbestos Litig.*, 798 F.Supp. 925, 931 (E. & S.D.N.Y. 1992), rev'd on other grounds, 995 F.2d 343 (2d Cir. 1993) and 995 F.2d 346 (2d Cir. 1993).

C. September 26, 1990, and April 15, 1991, Violations

We believe the district court also erred in setting aside the jury's verdict on the September 26, 1990, and April 15, 1991, violations on the basis that "no reasonable juror could find that these discharges were not excepted under the Act as agricultural stormwater discharges." CARE II, 834 F.Supp. at 1430. The district court drew this conclusion even though it had given explicit instructions to the jury on the availability of the "agricultural stormwater" exemption under 33 U.S.C. § 1362(14). Id. at 1429.

We agree with appellants that, while the statute does include an exception for "agricultural stormwater discharges," there can be no escape from liability for agricultural pollution simply because it occurs on rainy days. For guidance in our analysis, we examine the legislative and regulatory history of this exception which the court relies upon in arriving at its conclusion.

The exemption at issue was added by the Water Quality Act of 1987, Pub.L. No. 100-4 § 503, 101 Stat. 7, 75 (1987). Because Congress mandated comprehensive regulations of certain forms of industrial and municipal stormwater run-off under 33 U.S.C. § 1342(p), one can infer that Congress wanted to make it clear that agriculture was not included in this new program. We agree that agricultural stormwater run-off has always been considered nonpoint-

source pollution exempt from the Act. See, e.g., 40 C.F.R. § 122.3(e) (1993) (excepting "introduction of pollutants from non point-source agricultural and silvicultural activities").

We think the real issue is not whether the discharges occurred during rainfall or were mixed with rain water run-off, but rather, whether the discharges were the result of precipitation. Of course, all discharges eventually mix with precipitation run-off in ditches or streams or navigable waters so the fact that the discharge might have been mixed with run-off cannot be determinative. Accordingly, we must uphold the verdict to the extent that the jury had a reasonable basis to find that the discharges on September 26, 1990, and April 15, 1991, were not the result of rain, but rather simply occurred on days when it rained. We first examine whether the jury had a reasonable basis to find that these two violations were not the result of rain. We then examine whether the alleged violations must be categorized as "agricultural stormwater discharges," or whether they fall into the CAFO exception.

1. The Jury's Findings

As to the September 26 discharge, Karcheski testified that, "after a rain[ ] and manure had been applied on the field, [the manure] was literally running off everywhere up and down those field-type areas." Karcheski Testimony at 14-15. Similarly, Bly testified that he "could see the manure flowing, the tracks made by the equipment, flowing off the end of the field where there was severe erosion." Bly Testimony at 16. The New York State Department of Environmental Conservation Report ("D.E.C. Report"), reprinted in Joint Appendix at 227, while indicating that the run-off was attributed to "heavy rain," also points out that the "[f]ields have been saturated with liquid manure and farm continues to spread in same area." Sally Hunt, a witness who is not a party but who lives near the Karcheskis, testified that Southview Farms had spread the manure which "had pooled in the corner of their field right next to our

property . . . larger than I had seen before, and it had been pooled there, and then it rained. . . . Then it drizzled into the ditch and through the drainage pipe." (Transcript of 5/5/93 at 4). We think the jury could properly find that the run-off was primarily caused by the over-saturation of the fields rather than the rain and that sufficient quantities of manure were present so that the run-off could not be classified as "stormwater."

As to the April 15, 1991, discharge, Karcheski testified that there was "a lot of manure [was] coming off the field through the areas where the banks had fallen away and . . . tractors had come in and out, and they leave culverts or furrows and that. There was primarily in the bottom it had a lot of manure coming off." Karcheski Testimony at 20. Bly testified that, on April 14, 1989, he "observed heavy manure applications, once again, to this field" and "brown" "water runoff flowing off the field towards the fencepost." Bly Testimony at 28, 39. Photographs were received in evidence, and, based upon these photographs and Bly's testimony, the jury could have found a discharge unaffected by rain "on or about April 15, 1991." Similarly, as to the April 15 incident, the D.E.C. Report, reprinted in Joint Appendix at 226, while attributing the incident to rain, noted that there was "[e]xtra heavy application of manure in fields" and a "heavy cover of liquid manure."

2. CAFO Exception To Nonpoint Source Provisions

The New York Farm Bureau, Inc., and American Farm Bureau Federation, as amici curiae, ("Farm Bureau amici"), argue that agricultural activities are regulated as "nonpoint sources" under the Clean Water Act and are not subject to citizens' suits enforcement. They point out that the Act had its origin in the Federal Water Pollution Control Act Amendment of 1972, 33 U.S.C. § 1251 et seq., and that this act focused on "point source" discharges. The 1972 amendment imposed effluent limitations through a federally mandated and supervised permit system, the National

Pollution Discharge Eliminations System (N.P.D.E.S.), Pub.L. No. 92-500, § 403, 86 Stat. 816, 883 (1972), modified as amended, 33 U.S.C. § 1342 (1988 & Supp.IV 1992). The Farm Bureau amici point out that nonpoint sources "were addressed by Congress through the Section 208 planning process which placed primary responsibility on the states." Brief of Farm Bureau Amici at 6 (citing Pub.L. No. 92-500, § 208 (1972), 86 Stat. 816, 839, codified as amended, 33 U.S.C. § 1288 (1988 & Supp. IV 1992); S.Rep. No. 414, 92d Cong., 1st Sess. 139, reprinted in 1972 U.S.C.C.A.N. 3668 ("S.Rep. 414")). Thus, when Congress enacted the 1972 Amendments, it considered and chose to exempt agricultural activities under the Section 208 nonpoint source provisions "except in the case of [CAFOs]." Brief of Farm Bureau Amici at 7 ((emphasis added) (citing Pub.L. No. 92-500, § 208(b)(2)(F), 86 Stat. 816, 841 (1972), codified as amended, 33 U.S.C. § 1288(b)(2)(F); S.Rep. 414, reprinted in 1972 U.S.C.C.A.N. at 3759) (supplemental views of Sen. Dole)).

It is understood that the 1972 framework remains in place and that the revision made in 1977 to the point source definition excluded "return flows from irrigated agriculture," 33 U.S.C. § 1362(14), thereby overriding, in part, *Natural Resources Defense Counsel, Inc.* v. *Train*, 396 F.Supp. 1393, 1402 (D.D.C. 1975) (holding that the Federal Water Pollution Control Act Amendments of 1972 do not authorize the exclusion of point sources in the agriculture, storm sewer, and silviculture categories from the permit requirements of the N.P.D.E.S.), aff'd sub nom. *Natural Resources Defense Council, Inc.* v. *Costle*, 568 F.2d 1369, 1382 (D.C. Cir. 1977) (holding that the E.P.A. has no discretion to limit regulation of point sources to those it deems most significant). The Congress is said to have made its intent clear in the legislative history which states that the "effect" of the newly created section 402 is to amend section 208(b)(2)(F) and to "exempt irrigation return flows from all

permit requirements under section 402 . . . and assure that area wide waste treatment management plans under section 208 include consideration of irrigated agriculture." S.Rep. No. 95-217, 95th Cong., 1st Sess. 35 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4360. The Report further provides:

> In exempting discharges composed "entirely" of return flows from irrigated agriculture from the requirements of section 402, the committee did not intend to differentiate among return flows based upon their content. *The word "entirely" was intended to limit the exception to only those flows which do not contain additional discharges from activities unrelated to crop production.*

Id. (emphasis added).

Not disagreeing with any of the above, the United States amicus points out that the Clean Water Act by definition includes in the term "point source," "any discernible, confined and discrete conveyance, including but not limited to, any . . . concentrated animal feeding operation. . . ." 33 U.S.C. § 1362(14). The regulatory definition of a CAFO is found at 40 C.F.R. 122.23(b) (1994). This provision defines CAFO as an animal feeding operation ("AFO") that meets the criteria of appendix B, which, as pertinent here denotes that the AFO contains more than 700 mature dairy cattle. 40 C.F.R. 122.23(b). The preambles to the regulations indicate that if an AFO exceeds the relevant number of animal units provided in Appendix B Supp. to Part 122 at (a), the AFO is presumably a CAFO, unless "the only time a discharge of pollutants into navigable waters occurs is during a 25 year, 24-hour rainfall event." 40 Fed.Reg. 54182, 54183 (Nov. 20, 1975) (proposed regulations); 41 Fed.Reg. 11458, 11458 (Mar. 18, 1976) (final regulations); see also Brief for United States Amicus at 7. Given that it is undisputed that the feed lot at Southview confines more than 700 mature dairy cattle, Brief for Defendants-Appellees at 4, and there is no claim that the run-offs in question were caused by a 25-year, 24-

hour rainfall event, we face the question whether the fact that crops are grown on the fields, even though the cattle at Southview are not pastured on those fields, prevents Southview from being an AFO.

An AFO is defined in the regulations as "a lot or facility . . . where the following conditions are met:

> (i) Animals . . . have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and, (ii) crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

40 C.F.R. 122.23(b)(1). There appears to be no doubt that Southview's feed lot meets the criteria of sub-paragraph (i). The district court held that Southview was not an AFO because crops are grown on fields adjacent to the feed lot in which the milking cows are penned; therefore, according to the court, Southview does not meet the criteria of sub-paragraph (ii).

The district court's holding misreads the regulations and particularly paragraph (ii). A lot or facility is an AFO when it confines and maintains animals on a lot which does not contain vegetation in the normal growing season. The vegetation criterion applies to the lot or facility in which the animals are confined. The definition of "feed lot" contained in the regulations setting forth technology-based effluent limitations for such facility supports this interpretation. While the effluent limitation applicable to feed lots is not applicable to Southview because it has not obtained an N.P.D.E.S. permit, 40 C.F.R. 412.12, nevertheless, the regulation lends support to the United States' position, and the view we adopt, that the vegetation criterion pertains only to the lot or facility in which the animals are confined under that definition or "feed lot." It is said to be

> a concentrated, confined animal or poultry growing operation for meat, milk or egg production, or stabling, in pens or houses wherein the animals or poultry are fed at the place of confinement and crop or forage growth or production is not sustained in the area of confinement.

40 C.F.R. 412.11(b). The preamble to this regulation explains that the Environmental Protection Agency ("E.P.A.") chose to exclude from the definition those livestock holding areas in which crops are sustained in the area where the livestock are confined because "[u]nder [such] circumstances the combined effect of soil and vegetative assimilation of manure and the lower rate of manure depletion per unit area could reasonably be expected to preclude any significant pollution problem." 39 Fed.Reg. 5703, 5704 (Feb. 14, 1974). There is thus, as the United States amicus brief explains, a two-fold rationality for the exemption from the definition of CAFO for facilities in which animals are confined in vegetated areas. First, the fact that vegetation can be sustained in the area in which the animals are confined suggests a lower density of animals in that area or otherwise they would eat or trample all of the vegetation. Second, the vegetation itself is helpful in absorbing and reducing the amount of pollution. The E.P.A. regulations probably rely upon confinement in un-vegetated areas as an indicator of the "industrialized" nature of the confinement and therefore they include only such facilities—such as Southview's—within the regulatory definition of "animal feeding operations."

We wish to emphasize that the only previous case squarely on point is in conformity with the position we take here. *Higbee* v. *Starr*, 598 F.Supp. 323, 325 (E.D. Ark. 1984) (hogs confined in finishing houses in which hog waste fell through slats in floors into holding basins and was then spread on neighboring fields; operation held to be a CAFO), aff'd without opinion, 782 F.2d 1048 (8th Cir. 1985). Accordingly, the district court erred in deciding that

Southview does not operate a CAFO based on the growth of crops outside the area in which the cows are confined. Because there are no disputed material facts with respect to whether Southview's feed lot is a CAFO, this court may determine, as a matter of law, that Southview operates a CAFO, which in turn may be defined as a point source and hence is not to be treated as an agricultural nonpoint source operation calling for regulations by the states under the section 208 planning process.

V. Conclusion

In short, we conclude with the United States as amicus, that Southview has an animal feeding lot operation with a tremendous number of cattle in a concentrated feeding facility in which no vegetation is grown; that operation in and of itself is a point source within the Clean Water Act and not subject to any agricultural exemption thereto.

Accordingly the judgment of the district court, setting aside the jury's verdict, is reversed and the cause remanded for further proceedings in accordance with this opinion.

PETITION FOR REHEARING
UNITED STATES COURT OF APPEALS
Second Circuit

GEORGE LANGE III
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of November one thousand nine hundred and ninety-four.

Concerned Area, et al

Plaintiffs-Appellants,

v Dkt No: 93-9229

Southview Farm, et al

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellees Southview Farm and Richard H. Popp.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal

and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, et al., Plaintiffs,

v.

SOUTHVIEW FARM and Richard Popp, Defendants.

No. 91-CV-6031L.

United States District Court,
W.D. New York.

October 19, 1993.

DECISION AND ORDER

LARIMER, District Judge.

BACKGROUND.

This is a citizen suit under the Federal Water Pollution Control Act, also known as the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1251 et seq. Also originally pleaded were several supplemental state claims including negligence, nuisance and trespass. The relevant facts have been set out in this Court's prior decisions on defendants' motions to dismiss and for summary judgment, entered on August 29, 1991 and April 7, 1993 respectively. Familiarity with those decisions is assumed.

On May 19, 1993, a jury returned in a verdict in the trial of this action finding that defendants had violated the CWA on five occasions, and that defendants had committed a common law trespass against each plaintiff. The jury found in favor of defendants on six other alleged CWA violations, and it also found no cause of action on all of the negligence and nuisance claims.

The jury awarded damages on the trespass claims, but the court's determination of a remedy for the CWA claims is contingent upon my resolution of these post-trial motions.

Defendants now move for judgment as a matter of law under Fed.R.Civ.P. 50(b) on the CWA and trespass claims.

Defendants' motion is granted on all of the CWA claims, but otherwise denied.

1. *Legal Standard*

Defendants' burden to prevail on a motion for judgment as a matter of law following a jury verdict in plaintiffs' favor is a strict one. *Stubbs v. Dudley*, 849 F.2d 83, 85 (2d Cir. 1988), *cert. denied*, 489 U.S. 1034, 109 S.Ct. 1095, 103 L.Ed.2d 230 (1989). The court should grant the motion "only when (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him." *Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163, 167-68 (2d Cir. 1980). If the evidence, viewed in the light most favorable to plaintiffs, was sufficient to have allowed a reasonable juror to arrive at a verdict for plaintiffs, the motion must be denied. *Konik v. Champlain Valley Physicians Hosp.*, 733 F.2d 1007, 1013 (2d Cir. 1984), *cert. denied*, 469 U.S. 884, 105 S.Ct. 253, 83 L.Ed.2d 190 (1984).

In deciding the motion, the court must draw all reasonable inferences, and resolve all questions of credibility, in plaintiffs' favor. *Id.* "[T]he trial court cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury." *Mattivi*, 618 F.2d at 167.

Despite the heavy burden placed on the moving party, however, when it is clear that the evidence does not support

the verdict, the motion must be granted. "It is error to deny a judgment notwithstanding the verdict when it is clear that the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party." *Erickson v. Pierce County*, 960 F.2d 801, 804 (9th Cir.), *cert. denied*, ____ U.S. ____, 113 S.Ct. 815, 121 L.Ed.2d 687 (1992); see also *Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202, 207 (2d Cir. 1984) (district court erred in denying motion for judgment n.o.v. in view of insufficiency of the evidence to support plaintiff's claim).

In addition, a mere scintilla of evidence will not suffice to support a verdict. *Meyers v. Ideal Basic Indus., Inc.*, 940 F.2d 1379, 1383 (10th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 935, 117 L.Ed.2d 106 (1992). "The jury's role as the finder of fact does not entitle it to return a verdict based only on confusion, speculation or prejudice; its verdict must be reasonably based on evidence presented at trial." *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir.), *cert. denied*, 429 U.S. 885, 97 S.Ct. 236, 50 L.Ed.2d 166 (1976). If, after viewing all the evidence most favorably to plaintiffs, the court cannot say that the jury could reasonably have returned the verdict in their favor, it is the court's duty to set the verdict aside. *Id.*

2. *July 12, 1989 and August 22, 1989 CWA Violations*

The jury found that CWA violations occurred on five dates: July 12, 1989; July 13, 1989; August 22, 1989; September 26, 1990; and April 15, 1991. Defendants allege that there is no evidence that the July 12, 1989 and August 22, 1989 discharges occurred at all.

Plaintiff Philip Karcheski testified at trial about the alleged July 12 violation. He stated that while driving his vehicle on a nearby road at dusk, he saw "tanks pulled by the tractors" going into a certain field. Def.Ex. A at 4.[1] "At that point

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[1] References to defendants' exhibits are to the exhibits attached

[he] didn't pay attention" to whether manure was being discharged from the field. *Id.*

His curiosity aroused, Karcheski returned the next evening, July 13, in the company of plaintiff Kirk Bly. Karcheski stated that he saw "the same thing, and still manure trucks were operating the lagoons—the tanker trucks." *Id.* at 5. He then "went into the field, and the area was just kind of saturated with kind of like liquid manure." *Id.* Some of the manure was exiting the property through a ditch. *Id.* at 6.

Bly also testified at trial. He stated that on July 12, while riding on a road, he "noticed a field on the Wyant farm that had received a large amount of—a large amount of liquid manure." Def.Ex. B at 6. He stopped his vehicle and looked at the field and a "running light in the far corner of the field" for several minutes, but he did not get out of his vehicle to inspect the field. *Id.*

Bly also testified that when he went back to that spot on July 13, first alone and then with Karcheski, what he saw was "very similar to what [he] observed on the 12th." *Id.* at 8. Walking around with Karcheski, he saw "a slurry type manure" flowing out of the field and eventually into a stream. *Id.* at 9.

As to the August 22 violation, Karcheski testified that on that date he saw "the tankers . . . coming down the road again and entering the same area [as on July 12 and 13] . . ." Def.Ex. A at 8. He stayed for about ten or fifteen minutes, and did not see any liquid manure leaving defendant's property. *Id.*

Bly gave similar testimony. He said that in "the same field, same area" as on July 12 and 13, he "noticed a heavy application of manure had been applied again." Def.Ex. B

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to the July 1, 1993 affidavit of John W. Clarke, Esq., in support of the motion *sub judice* (Court document # 63).

at 11-12. He did not actually enter the field, and he did not testify that he saw any discharges from the property.

In my view, this testimony is not sufficient to support the jury's finding that discharges occurred on July 12 and August 22. Neither Karcheski nor Bly stated that they actually saw a discharge of manure from the property on either date, and their testimony was not strong enough to support an inference that violations occurred on those days simply because they saw a discharge in the same area on July 13. There are so many variables involved—the amount of manure spread, the duration of the spreading, the physical condition of the ground, etc.—that it would be speculation to infer discharges on July 12 or August 22 based on the July 13 incident.

Even assuming that defendants were spreading manure in the exact same manner and place on the 12th as on the 13th, that alone does not warrant drawing the conclusion that a discharge of pollutants into navigable waters occurred on the 12th merely because one allegedly occurred on the 13th. For one thing, there was no evidence of how long defendants had been spreading manure when Karcheski and Bly saw the tank trucks on July 12. Both men said that they noticed manure-spreading going on in the early evening of July 12. Neither knew how long this activity had been going on at that point, which would obviously have a bearing on the amount of manure the field had received.[2]

Moreover, the conditions under which the manure was spread on July 13 differed in one highly important respect from the day before, precisely because defendants *had* spread manure on the 12th. If defendants spread manure in the same area on both days, then there must have already been

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[2] Karcheski stated only that he saw defendants' trucks twice that evening, and that the second time was "maybe an hour or so" after the first. Def.Ex. A at 4.

manure on the ground when they began spreading on the 13th. That would obviously make it more likely that the ground would become saturated sooner and the manure would spill out from the field.

Evidence from which the jury could have reasonably inferred a discharge on August 22 is also lacking. Even crediting Bly's statement that the application of manure that day was "heavy," that simply does not warrant the conclusion that some of the manure left the field and entered navigable waters. Bly's statement that the weather that day was "dry," Def. Ex. B at 12, further weakens such an inference.

What remains as to both dates, then, is testimony that manure was applied to defendants' field, and that testimony is insufficient to find a CWA violation.

I conclude that the jury's finding of a discharge on July 12, 1989 and August 22, 1989 "was sheer surmise and conjecture." *Mattivi*, 618 F.2d at 167 (quoting *Armstrong v. Commerce Tankers Corp.*, 423 F.2d 957, 960 (2d Cir.), *cert. denied*, 400 U.S. 833, 91 S.Ct. 67, 27 L.Ed.2d 65 (1970)). There was simply a "complete absence of substantial evidence supporting the verdict" on this question, *id.* at 169, and the verdict must therefore be set aside as to these two CWA violations.

3. *September 26, 1990 and April 15, 1991 CWA Violations*

Defendants argue that the September 26, 1990 and April 15, 1991 discharges were "agricultural stormwater discharges," which are specifically excluded from the definition of "point source," 33 U.S.C. § 1362(14), and hence from the coverage of the Act itself, since only point source discharges of pollutants constitute violations of the Act.

Sally Hunt, a non-party to this action, was called as a witness by plaintiffs. She testified that on September 26,

1990, she observed an application of liquid manure by defendants on a field adjacent to her property. She said that this application was heavier than most, and that the manure "pooled in the corner of [defendants'] field right next to [her] property." Def.Ex. C at 4. She stated that later that day it rained, and the manure "drizzled into the ditch and through the drainage pipe." *Id.*

Bly testified that on September 26, as he was driving near fields surrounding the Hunt residence, he "could see the manure flowing, the tracks made by the equipment, flowing off the end of the fields where there was severe erosion [sic]." Bly Tr., Apr. 30, 1993, at 16. He did not see any tankers. He also noticed that there was discolored water flowing through a ditch along the field. *Id.* at 17.

As to the April 15, 1991 incident, Hunt testified that on that date, defendants "had worked the field and worked all the grass off up to the ditch. And so then they spread manure, and it subsequently rained, and it washed into the ditch." Def.Ex. C at 8. When asked if she had personally observed the manure being washed into the ditch, she replied, "Not myself, but I know they spread it." *Id.*

Plaintiff Bly testified that April 15 was "a wet day" and that a photograph he took that day depicted "water flowing—water runoff flowing off the field towards the fencepost." Def.Ex. B at 38-39. Other photographs taken that day showed a "close-up of the water run-off showing the brown water, foam in the field," a "stream in Letchworth Park, several yards from the field, which the run-off was coming from showing brown, yellow water and foam." *Id.* at 39.

Plaintiff Karcheski also testified about his observations on April 15. He stated that near the intersection of Middle Reservation and Swyers Roads, he saw "a lot of manure coming off the field through the areas where the banks had fallen away and like, you know, tractors had come in and

out, and they leave culverts or furrows and that." He saw "water and manure" in an adjacent ditch. Karcheski Tr. Apr. 28, 1993 p. 20. He stated that "[t]he ground was wet, but [he did]n't recall it raining when [he] was there." *Id.* p. 21.

In addition to this live testimony, two reports prepared by the New York State Department of Environmental Conservation ("DEC") were admitted into evidence. The first, which was prepared in response to a complaint by Hunt to the DEC, stated that "Due to heavy rain in area about 2 PM on 9/26/90—Runoff from fields on north side of Swyers Rd. cause[d] manure to run into road ditch. Drainage enters Genesee River through Letchworth State Park property." Def.Ex. G.

The second report was written after an investigation of a complaint by Bly on April 15, 1991. That report stated that "Heavy rain caused manure to run off into streams through park into Genesee River." Def.Ex. G.

In my view, the evidence does not support the verdict as to either of these two discharges. First—particularly concerning the April 15 discharge—there was insufficient evidence that any discharge occurred from a point source. Bly's testimony that he saw "water runoff flowing off the field," in fact, supports precisely the opposite view: that the discharge on this date was simply disparate run-off caused by rainfall. The DEC report was consistent with Bly's testimony, stating only that manure had run off into streams.

Hunt's testimony about the April 15 incident was also inadequate. Although she said that manure had "washed into the ditch," the basis for that statement is not apparent, since Hunt then said that she had not "personally observe[d] it being washed into the ditch," but only that she "kn[e]w they spread it" and she "kn[e]w there was no vegetation" on the field. Def.Ex. C at 8.

Karcheski's testimony was unclear at best as to what caused the alleged discharge. However, his statements that the ground was wet and that there was water in the ditch adjacent to the field, and that "the banks [we]re crumbling down into the ditch," Karcheski Tr. Apr. 28, 1993, p. 28, taken together with Bly's and Hunt's testimony, indicates that this was run-off rather than a point source discharge.[3]

There was virtually no evidence at all, then, that a point source discharge occurred on April 15. Hunt had no personal knowledge that a discharge occurred from a point source, Karcheski's testimony was inconclusive, and Bly's testimony actually supported defendants' position.

The evidence concerning the September 26 discharge is of a different nature, but no less problematic. Hunt did testify that the manure had "pooled" near the edge of the field and, when it rained, the manure "drizzled into the ditch and through the drainage pipe." The DEC report also indicated that the manure had entered streams through a ditch.

There was some evidence, then, that the manure had collected into a pool on defendants' property and that it entered navigable waters through a discrete conveyance, *i.e.*, the ditch.

The inquiry does not end there, however, for in 1987 Congress amended the Act to exclude agricultural stormwater discharges from the definition of "point source." 33 U.S.C. § 1362(14). The question, therefore, is whether the September 26 discharge fell within that exclusion.

Unfortunately, neither the Act itself, the regulations promulgated by the Environmental Protection Agency

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[3] In addition, even if Karcheski's testimony would support an inference that the April 15 discharge was not mere run-off, this discharge fell within the statutory exception for agricultural stormwater discharges, as discussed in detail *infra*.

("EPA"), the legislative history, nor the case law provides much guidance as to the meaning of "agricultural stormwater discharge." The term is not defined in the Act or in any regulations, although "storm water" is defined at 40 C.F.R. § 122.26(b)(13) as "storm water runoff, snow melt runoff, and surface runoff and drainage."

The legislative history is both sparse and unhelpful, stating only the obvious: that the new language "amends Section 502(14), of the Act, by providing that Agricultural Stormwater Discharges are not defined as a point source." Section-by-Section Analysis, 133 Cong.Rec.H 131 (Jan. 7, 1987), *reprinted in* 1987 U.S.C.C.A.N. 5, 41. Also, the parties have not submitted, and the Court has not found, any cases interpreting this exception.

Nevertheless, both common sense and what little authority there is in this area dictate that the September 26 discharge does fall within the exception. First, the fact that Congress saw fit to add this language to § 1362(14) suggests that Congress believed that, without an express exception, agricultural stormwater discharges *could* be considered point-source discharges. In other words, the amendment excepted from the scope of the Act certain discharges which would otherwise constitute point-source discharges.

That view is reinforced by certain other amendments enacted in 1987 dealing with other, non-agricultural stormwater discharges. For example, § 1342(l) was amended to provide that permits are not required for discharges through discrete conveyances of stormwater runoff associated with certain types of industrial activity, so long as the water is uncontaminated by contact with raw materials or certain specified other types of materials. Presumably, contaminated industrial stormwater discharges would continue to require permits. Since non-point source discharges do not require permits to begin with, this implies that Congress considered discharges of industrial stormwater to be point-source

discharges; it was merely exempting some of them from the permit requirement.

With agricultural stormwater discharges, however, Congress went even further, and excluded them completely from the definition of point-source discharges. Agricultural discharges, then, are not simply point-source discharges that do not require a permit; they are not point-source discharges at all, notwithstanding that they might occur through a discrete conveyance.

The fact that Congress saw a need to amend the statute to add a specific exception for agricultural stormwater discharges also suggests that Congress was not concerned simply with disparate, random run-off of rain water; that type of run-off had already been generally held by the courts not to constitute a point-source discharge. *See, e.g., United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979). If that had been Congress' only concern, the exception would have been unnecessary. It is a fundamental rule of statutory construction that courts should avoid an interpretation of a statute that renders any part of it superfluous. *State of Nevada v. Watkins*, 939 F.2d 710, 715 (9th Cir. 1991).

It appears, therefore, that the exception was aimed at *collected* or *channelled* storm water, *i.e.*, storm water discharges which would ordinarily constitute point-source discharges. The fact that the discharge in this case came from a "pool" or ditch, therefore, does not in itself take this case out of the statutory exception created by Congress for agricultural stormwater discharges.

Plaintiffs' contention that "stormwater" means only run-off which is completely unpolluted by contact with any contaminants is not persuasive. Plaintiffs rely for that assertion on a statement by the EPA in the preamble to a Federal Register notice of certain regulations that "some classes of nonstormwater discharges may typically contain

only minimal amounts of pollutants." Congress did not intend that the term stormwater be used to describe any discharge that has a de minimis amount of pollutants. 55 F.R. 47995 (Nov. 16, 1990). That statement, however, can reasonably be read to mean only that the mere fact that a discharge contains a de minimis amount of pollutants does not necessarily mean that it should be treated as a stormwater discharge. In other words, the stormwater or non-stormwater character of the discharge is not determined by the presence or amount of pollutants in the discharge.

Moreover, "storm water," according to the EPA, means "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13). "Runoff" has been defined by the Court of Appeals for the District of Columbia Circuit as "wastewaters generated by rainfall that drain over terrain into navigable waters, *picking up pollutants along the way*." *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977). That interpretation is almost self-evidently correct, as it seems virtually impossible for rain water to travel over the ground without picking up at least a minimal amount of pollutants. To think of "stormwater" as including only "pure" rain water unadulterated by any substances on the ground whatsoever would render the agricultural stormwater discharge exception practically meaningless.[4]

The cases cited by plaintiffs in support of their interpretation of this exception are distinguishable. Some of the cases, such as *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41 (5th Cir. 1980), and *Residents Against Industrial*

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[4] Title 33 U.S.C. § 1342(l) does speak of "uncontaminated" industrial stormwater discharges, but that adjective is qualified in that the reference is to stormwater uncontaminated by contact with certain specific types of materials. Presumably, then, stormwater "contaminated" by contact with materials other than those listed is not covered by that section.

Landfill Expansion v. Diversified Systems, Inc., 804 F.Supp. 1036, 1039 (E.D.Tenn. 1992), did not involve agricultural activities. Some, including *Abston* and *United States v. Oxford Royal Mushroom Products*, 487 F.Supp. 852 (E.D.Pa. 1980), were decided *before* the 1987 CWA amendments which created the exception for agricultural stormwater discharges.

Plaintiffs maintain that a discharge, even if its most immediate cause was rainfall, does not fall within the exception if defendants' activities (such as prior applications of manure) contributed to the discharge. This argument, however, confuses the issue of run-off-versus-point source discharges with the issue of agricultural stormwater discharges. The cases cited by plaintiffs (including my summary judgment decision in this case) addressed the question of when runoff has been sufficiently affected by man to become a point source discharge. That is an entirely different issue from whether a discharge comes within this exception for agricultural stormwater discharges.

Plaintiffs also argue that to hold that the discharges in this case were agricultural stormwater discharges would allow defendants to escape liability under the Act by watching the weather forecasts and applying manure just before a rainstorm. Defendants' liability, though, will not be made limitless by my decision. For example, defendants cannot simply dump a truckload of manure into a storm sewer or ditch and claim that that is an agricultural stormwater discharge, since in that situation the discharge would clearly have been caused by defendants, not by the effects of natural precipitation. In contrast to that scenario, the instant case involves manure lawfully and legitimately applied to defendants' land in the court of agricultural activity, which, as far as the proof showed, would have remained on their land had it not been for a heavy rain.[5] If this activity does

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[5] Although Bly did not testify that the discharge was caused by

not fall within the exception for agricultural stormwater discharges, it is difficult to see what would. This is not a case like *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055 (5th Cir. 1991), in which the defendants deliberately cut a spillway out of the embankment of a wastewater holding pond after the pond had become full due to heavy rains.[6] The discharge here involved the natural movement of rain water over the ground, albeit rain water which mixed with manure before running off the field into a ditch. To hold that a point source discharge exists when rain water flows across a farm field and picks up or mixes with fertilizer, however, would have far-reaching effects that I believe were precisely what Congress wanted to avoid when it added this exception for agricultural stormwater discharges.

It is evident that Congress had a definite purpose in mind when it enacted this exception, and that purpose was clearly to exempt certain farming activities from the reach of the Clean Water Act, either because of the importance of those

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rain, he apparently witnessed the discharge some time after the manure had been spread, since he said that he saw no tankers in the field at the time. His statement that water was flowing through the ditch also suggests that he arrived after the rain had begun. Thus, his observations, as far as they went, were consistent with Hunt's.

[6] It should also be noted that the farm in *Carr* was held to be a "concentrated animal feeding operation," which *per se* made it a point source. 33 U.S.C. § 1362(14). The court in *Carr*, therefore, was not faced with the question of whether the discharges were agricultural stormwater discharges.

In the instant case, I declined to give an instruction on concentrated animal feeding operations because the proof showed that crops were sustained over a portion of Southview Farm, which took it out of the definition of that term. 40 C.F.R. § 122.23(b)(1).

activities to society, or because of the difficulty of regulating them, or both. It is not the function of this court to decide whether this exception is good or bad, or wise or unwise. Rather, the court's task is to apply the statute to the facts before me, and having done so, I find that the only reasonable conclusion is that the discharges here fall within the exception.

I am aware that the jury was instructed that agricultural stormwater discharges are not covered by the Act, and that a jury verdict is not lightly to be set aside. When the facts demand it, however, that is the duty of the court. In fairness to the jury in this case, it should also be noted that (as the preceding discussion should make plain) this is not a simple, straightforward matter in which any layman can easily judge the facts according to his common sense. The parameters of this part of the Act are complex and largely uncharted. That the jury's verdict is insupportable, therefore, is probably less the result of faulty reasoning on their part than a testament to the exceedingly difficult task given them of trying to grasp the subtleties of a labyrinthine statute such as the CWA based solely on a jury charge, a task compounded by the fact that this was merely one issue among many presented to them at the end of the case.

In any event, in my view the evidence was such that no reasonable juror could find that these discharges were not excepted under the Act as agricultural stormwater discharges.

4. *Point Source Discharge*

Defendants also contend that plaintiffs did not prove that any of the five alleged discharges occurred from a "point source," which is defined as "[a]ny discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). A discharge of pollutants does not violate the Act unless it emanates from a point source.

My ruling on the July 12 and August 22, 1989 discharges makes this issue moot as far as those two alleged violations are concerned. There was insufficient evidence of any discharges on those two days, from a point source or otherwise. Likewise, I have already held that the September 26, 1990 and April 15, 1991 discharges were agricultural stormwater discharges, and therefore were not point-source discharges.

That leaves only one discharge, on July 13, 1989. As to that event, Karcheski testified on direct examination as follows:

> Q. Did you observe any of the manure that was there exiting the property?
>
> A. In the ditch.
>
> Q. All right.
>
> A. We didn't notice much on the hills, because it was like—it wasn't solid stuff. It was just running off, and it was in the ditch, and Kirk [Bly] had come up from that way and said he had been following it down the ditch.

Karcheski Tr. 4/28/93 at 8-9.

Describing his observations on July 13, Bly testified that

> As I approached the southeast corner of the field, it was evident that a lot of manure had been applied, and I was starting to walk through a slurry type manure that was flowing under the fence through the ditches and the field. . . . I followed this flow, this lava-like flow of manure down into the park where it meets a small stream and followed that stream even farther to where it meets another stream.
>
> Q. Where does that stream go to?
>
> A. That stream flows approximately a quarter mile to the Genesee River.

Bly Tr. 4/30/93 at 9.

Bly also testified that

> [m]anure was flowing off the hilly areas of the field and down into the low spots under the fence, off the field. . . . I continued along the woods in the park to the easterly side of the field and witnessed another event similar to the one on the southeast side, the manure flowing off at a low spot in the field, a depression into another small stream . . .

Id. at 9-10. He stated that he followed the manure in the stream "in [Letchworth] park several hundred yards." *Id.* at 10.

Defendants raised the point-source issue on their prior motions to dismiss and for summary judgment. I denied those motions on the ground that there were issues of fact about whether a point-source discharge occurred. Plaintiffs having presented their proof at trial, the question now becomes whether the evidence is sufficient to find that the July 13 discharge was from a point source.[7]

The Second Circuit recently decided a case which further delineates the nuances of the term "point source." In *United States v. Plaza health Labs., Inc.*, 3 F.3d 643 (2d Cir. 1993), a two-judge majority held that the district court in a criminal CWA case had erred in ruling that a human being could be a point source.

Although my prior decisions in this action dealt with the point-source issue at some length, the *Plaza Health* decision necessitates some further discussion of the subject, not only

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[7] Rather that decide this issue after closure of the proof but before the case went to the jury, following clear Second Circuit directives, *see Mattivi v. South African Marine Corp. "Huguenot"*, 618 F.2d 163, 166 (2d Cir. 1980); *Gratian v. General Dynamics*, 587 F.2d 121 (2d Cir. 1978), I submitted the issues to the jury and left the matters to be resolved on post-verdict Rule 50 motions.

because it is the Second Circuit's most recent pronouncement on the question, but also because it modifies in some respects the contours of the case law in this area.

In reaching its conclusion that a person cannot be a point source, the Court of Appeals noted that the "Clean Water Act generally targets industrial and municipal sources of pollutants . . ." 3 F.3d at 646. The court stated that this focus is evidenced in part by the many references in the Act to "owners or operators" of point sources.

The court found further support for this view in the legislative history of the CWA. As an example, the court quoted a Senate report referring to the need to distinguish control of runoff from control "where there are *specific confined conveyances, such as pipes . . .*" *Id.* at 647 (quoting S.Rep. No. 92-414, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3744) (alteration in original). The court went on to quote the following comments of Senator Robert Dole which were added to the report:

> Most of the problems of agricultural pollution deal with non-point sources. Very simply, a non-point source of pollution is one that does not confine its polluting discharges to one fairly specific outlet, such as a sewer pipe, drainage ditch or a conduit; thus, a feedlot would be considered to be a non-point source as would pesticides and fertilizers.

The court concluded that the term "point source" as applied to a human being was at best ambiguous, and that the rule of lenity in criminal cases required a reversal of the defendant's conviction.

In a dissenting opinion, Judge Oakes stated that the term "point source" has been applied to a wide range of polluting techniques, a common feature of which is that the pollutants "reach the navigable waters by human effort or by leaking from a clear point at which waste water was collected by human effort." 3 F.3d at 651.

Judge Oakes also considered what constitutes a nonpoint source discharge, which, he stated, "is, generally, runoff: salt from roads, agricultural chemicals from farmlands, oil from parking lots, and other substances washed by rain, in diffuse patterns, over the land and into navigable waters." 3 F.3d at 652. To attempt to control such discharges, he stated, "could require radical changes in land use patterns which Congress evidently was unwilling to mandate without further study." *Id.*

Despite Judge Oakes's dissent, it is clear from reading both the majority and dissenting opinions in *Plaza Health* that the entire court did agree on one thing: that a point source, as the Act itself states, must be "discrete" and "confined." In fact, Judge Oakes opined that persons may be *non*point sources when they deposit waste in a diffuse manner, such as when they "spread fertilizer on the ground or deposit oil in a driveway, leaving it to be washed into nearby rivers." 3 F.3d at 655 n.6. Similarly, in stating that the Act should be held to cover "a company [which] chooses to use the nation's waters as a dumpsite for waste it has created and gathered in a manageable place," Judge Oakes added in a footnote, "I mean to distinguish a company whose agricultural or other activity leaves pollutants dispersed on the land, which may then find their way into the nation's waters." 3 F.3d at 655 n. 7. It is evident that even Judge Oakes would not find such an entity liable under the CWA.

Several points may be drawn from *Plaza Health*. First, the court appears to have stepped back somewhat from the line of cases which have taken an expansive view of "point source." It is true that the court distinguished some of those cases on the ground that *Plaza Health* was a criminal case in which the rule of lenity applied, but the court did not state that it would have reached a different conclusion in a civil case. Also, while it would be an exaggeration to say that the court adopted a restrictive reading of "point source," *Plaza Health* did set some limits on the applicability of that term,

even where the means of conveyance of a pollutant is discrete, as a human being surely is.

Second, *Plaza Health* emphasized that the focus of the CWA is on industrial and municipal polluters. Although the court was primarily concerned with distinguishing individual human polluters, it is also true that the Act is aimed more at industrial and municipal polluters than at agricultural polluters.[8] The Act specifically protects certain agricultural activities, notably in the exceptions for irrigation return flows and agricultural stormwater discharges.

The timing of the adoption of the irrigation exception is also indicative of Congress' concern with limiting the reach of the Act in the field of agriculture. On November 16, 1977, the Court of Appeals for the District of Columbia Circuit issued a decision holding that the EPA lacked authority to exclude irrigation return flows from the definition of "point source." *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). The amendment inserting the irrigation exception in the Act was enacted by Congress the very next month. Pub.L. 95-217, § 33(b), 91 Stat. 1577 (Dec. 27, 1977).

It is true, of course, that the Act does not provide a blanket exception for *all* agricultural activities. In particular, it includes a "concentrated animal feeding operation" within the definition of "point source." 33 U.S.C. § 1362(14). Yet even this is equally *ex*clusive as it is *in*clusive. Just as the definition of "point source" effectively defines by exclusion "nonpoint source," *i.e.*, every source of pollutants that is not a point source,[9] so the definition of "concentrated animal

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[8] Judge Oakes was in agreement with the majority on this point as well; he stated that "disposers of industrial and municipal waste . . . were the principal targets of the authors of the CWA . . ." 3 F.3d at 655.

[9] *See Plaza Health*, 3 F.3d at 652 n.2 ("The cases and

feeding operation" as a lot or facility where more than 700 adult dairy cattle are kept for at least forty-five days in any twelve-month period, and where crops are not grown over any portion of the lot or facility, obviously leaves out many types of cattle operations. 40 C.F.R. § 122.23(B)(1), § 122.23(b)(3).

In drafting the CWA, then, Congress took pains to protect certain types of agricultural activities from the controls placed on point sources. In part, that appears to be a product of Congress' belief that most agricultural pollution either comes from nonpoint sources, or poses problems of management similar to those of nonpoint sources, which simply do not lend themselves to the kind of control that the CWA provides for with respect to industrial and municipal point sources.[10]

It is also noteworthy that Congress enacted these protections for agriculture despite, and quite likely because of, the enormity of the problem posed by nonpoint source pollution in general, and agricultural pollution in particular.[11] There can be no doubt that Congress has

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commentators all seem to assume that all water pollution is either point source pollution or nonpoint source pollution") (Oakes, J., dissenting); George A. Gould, *Agriculture, Nonpoint Source Pollution, and Federal Law,* 23 U.C. Davis L.Rev. 461, text accompanying n. 83 (1990) ("The Act does not define 'nonpoint source,' but theoretically this would include any water pollution not caused by a point source").

[10] For example, in enacting the irrigation exception, Congress appears to have shared the EPA's concern that regulation of irrigation return flows would place an 'extraordinary burden" on the EPA, which would otherwise have faced the "spectre of millions of applications for permits . . ." *Natural Resources Defense Council*, 568 F.2d at 1377.

[11] *See* 2 William H. Rodgers, Jr., *Environmental Law: Air and*

become increasingly aware both of the extent of the nonpoint source pollution problem, and of the role played by agriculture in that problem.

As enacted in 1972, the CWA asked states to draft waste treatment management plans, which would include procedures for identifying nonpoint source pollution from various activities, including agriculture. 33 U.S.C. § 1288(b)(2)(F). In 1977, Congress added the Rural Clean Water Program, which sought to provide financial incentives to farmers to implement "best management practices" in controlling nonpoint source pollution from their land. 33 U.S.C. § 1288(j). A 1985 Senate Report stated that it had become "clear that nonpoint source pollution could no longer be ignored. . . . As point sources are brought under control, nonpoint pollution looms as a larger and larger problem." S.Rep. No. 50, 99th Cong., 1st Sess. 7-8 (1985) (quoted in Robert D. Fentress, Comment, *Nonpoint Source Pollution, Groundwater, and the 1987 Water Quality Act: Section 208 Revisited?*, 19 Envtl.L. 807, text accompanying n. 57 (1989)). In 1987, Congress passed the Water Quality Act, which declared a "national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution." 33 U.S.C. § 1251(a)(7). The 1987 amendments set up additional state nonpoint source management programs. 33 U.S.C. § 1329.

What is also apparent, however, is that Congress has been reluctant to attempt outright federal control of agricultural

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Water § 4.9 at 124-25 (1986) (noting estimates suggesting that "nonpoint sources account for up to 99 percent of suspended solids and usually between 50 to 90 percent of other conventional pollutants"); Davidson, *supra*, text accompanying n. 10-11 ("[A]gricultural practices are the principal source of nonpoint source pollution . . .").

and other nonpoint source pollution, preferring instead to leave most of the responsibility in this area to the states, and to use incentives rather than compulsion. Fentress, *supra*, text accompanying n. 85 (noting more "carrots" than "sticks" in provisions dealing with nonpoint sources). Regarding the irrigation return flow exemption, one commentator has even stated that "the drafters intended all agricultural drainage to be excluded from regulation and, as nonpoint sources, to be covered instead only by the informal planning processes" provided for elsewhere in the Act. John H. Davidson, *Thinking About Nonpoint Sources of Water Pollution and South Dakota Agriculture*, 34 S.D.L.Rev. 20, text accompanying n. 114 (1988/1989).

With these considerations in mind, I conclude that the evidence in this case was not sufficient to establish that the July 13 incident was a point source discharge. The pollutants witnessed by Bly and Karcheski that day consisted of diffuse runoff, and in my view this was not the sort of pollution that Congress intended to be covered by the Act.

The linchpin of plaintiffs' attempt to show that this was a point source discharge is the reference by Bly and Karcheski to a "ditch," which is part of the Act's definition of a point source. 33 U.S.C. § 1362(14). The term "ditch" suggests a discrete channel; the most apt definitions of "ditch" in Webster's Third New International Dictionary (1981 ed.) are "a long narrow excavation dug in the earth," "a trench for conveying water for drainage or irrigation," and "a natural or artificial usu. narrow watercourse or waterway."

The record, however, shows that on July 13 the liquid simply, and quite naturally, flowed to and through the lowest areas of the field. Describing the "ditch," Karcheski said that "there's kind of like two rises, and like a ditch . . . A low area running in between . . ." Karcheski Tr. 4/28/93 at 6. Similarly, Bly stated that "Manure was flowing off the hilly areas of the field and down into the low spots under the fence, off the field." Bly Tr. 4/30/93 at 9-10. He said that

at another part of the same field, he saw "the manure flowing off at a low spot in the field, a depression into another small stream . . ." *Id.* at 10.

The photographs taken by Bly of the October 4, 1991 incident, which occurred at the same area as the July 13, 1989 event, and which was intended to establish that the violation at that field was a continuing one, also do not reveal any "ditch." It appears only that there were some gentle rises or slopes in the field, which of course means that there were relatively low spots as well. Plaintiffs' Ex. 77.

The testimony and photographs do indicate that the liquid eventually flowed off the field into a small stream or rivulet. This stream, however, appears to have been a natural watercourse, which in turn led to other streams and eventually into the Genesee River.

The question, therefore, is how the pollutants reached this stream, and I find that they did so in too diffuse a manner to create a point source discharge. The liquid manure was spread on the field, some of it settled into low-lying areas, and some eventually reached the stream.

The type of discharge lacks some of the essential elements of a point source discharge. The pollutants in this case were not "collected" by human activity; in fact, the opposite occurred—the manure was dispersed over the ground. Further, once the manure was spread, defendants made no effort to collect or channel it. They did not pour it into a pool or lagoon, for example, nor did the field have any sort of berm or dike intended to make it a self-contained system. This case therefore contrasts with *Oxford Royal Mushroom Products*, 487 F.Supp. 852, in which the waste water was supposed to remain within the field, but flowed out through a break in the surrounding berm.

In short, there was no "system" here, no "physical structures and instrumentalities that systematically act[ed] as a means of conveying pollutants . . . to navigable

waterways." *Plaza Health*, 3 F.3d at 646. As one commentator has observed, a "man-induced gathering mechanism plainly is the essential characteristic of a point source," 5 Robert E. Beck, *Waters and Water Rights*, § 53.-01(b)(3) at 216-17 (1991). Such a "mechanism" was absent here.

Furthermore, I do not believe that the vehicles or other devices used to spread the manure on the fields can be considered point sources under these facts. For one thing, they were not "gathering mechanisms" discharging pollutants into navigable waters. Rather, they dispersed the fertilizer onto the *ground*, some of which eventually reached waterways.

This is not to say that polluters may always escape liability under the Act merely by dumping pollutants on the ground. There may be situations where the casual connection is so immediate that the spreading mechanism could be deemed a point source, as, for example, where the pollutant is poured onto a dike at the edge of a river. In this case, though, the connection between defendants' activity and the alleged discharge was too far-removed to consider the tractors or spreaders as point sources. Virtually every manmade pollutant at some time was gathered or collected somewhere, and if a point source discharge could be found merely by tracing the pollutants back to the time at which they were last collected, practically every discharge would be a point source discharge. For example, solid fertilizer sold in bags may have been stored in a shed or truck before being spread on the fields. Surely neither the shed nor the truck would be considered a point source in this scenario.

I also believe that defendants' actions here were the kind of activity that Congress wanted to keep beyond the reach of the Act. The manner in which the manure was spread, and entered the waterways, presents many of the same characteristics of agricultural pollution in general which Congress has found inappropriate for point-source-based, or

"end of pipe" controls. On any given day, farmers throughout the country may be applying fertilizer to their fields. Some chemicals from that fertilizer may end up in navigable waters.[12] Trying to trace those chemicals to particular fields or applications, and determining whether the discharges were due to an overapplication of fertilizer, to irrigation return flows, or to stormwater runoff, would impose immense problems.

In that sense, these manure applications were similar to irrigation return flows. Speaking of the exemption for the latter, one writer has stated that

> [t]estimony in field hearings suggested that effluent limits based on technological methods may not be appropriate for control of return flow pollutants and the [Senate] committee determined that these sources were practically indistinguishable from any other agricultural runoff, which may or may not involve a similar discrete point of entry into a watercourse. All such sources, regardless of the manner in which the flow was applied to the agricultural lands, and regardless of the discrete nature of the entry point, are more appropriately treated under the requirements of section 208(b)(2)(F).

Davidson, supra, text accompanying n. 115 (citing S.Rep. No. 370, 95 Cont., 1st Sess. 35 (1977)).

In short, Congress believed that control of this kind of pollution could best be accomplished not through conventional technology-based systems, but through "radical changes in land use patterns" which Congress has sought to encourage, but which thus far it has been "unwilling to mandate without further study." *Plaza Health*, 3 F.3d at 652-53 (Oakes, J., dissenting).

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[12] *See* Gould, *supra*, text accompanying n. 57 (citing evidence that "half the nitrogen applied to fields does not reach the plants but enters streams and groundwater").

I reach this conclusion cognizant of my prior rulings that there were sufficient questions of fact on this issue to overcome defendants' summary judgment and dismissal motions. My decision today does not repudiate those prior rulings. A denial of summary judgment in no way precludes a subsequent entry of judgment as a matter of law after the evidence has been heard at trial, *see, e.g., Voutour v. Vitale,* 761, F.2d 812, 822 (1st Cir. 1985), *cert. denied,* 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed.2d 916 (1986); *Catts Co. v. Gulf Ins. Co.,* 723 f.2d 1494, 1502 (10th Cir. 1983), and I do not hold that under *no* set of facts could plaintiffs have prevailed on this issue, or that a discharge of manure can never be a point source discharge. This decision today is based on the evidence actually presented at trial; that evidence did not show a point source discharge.

In sum, I find that there was insufficient evidence to prove that pollutants were discharged from a point source on July 13, 1989 from defendants' fields, as required for a CWA violation.

5. Trespass Claim

Defendants maintain that the trespass claim should be dismissed because the testimony of plaintiffs' experts was insufficient to establish that defendants' manure was responsible for nitrates in plaintiffs' wells. Specifically, defendants contend that the expert testimony was too speculative and was not supported by adequate facts, and that the testimony of one expert, Dr. Jeffrey Chiarenzelli, was impermissibly based on the opinion of the other expert, Dr. Dale Baker.

The portions of the trial transcript submitted by defendants in support of their motion reveal that defendants did not object to the testimony that they now seek to challenge. *See* Def.Ex. J,K. To the extent that defendants contend that the testimony of these two men was not admissible, then, I find that defendants waived this issue by failing to make a timely

objection at trial. *See United States v. Bilzerian,* 926 F.2d 1285, 1294-95 (2d Cir.) (since expert's general testimony was not objected to at trial, admissibility issue was waived), *cert. denied,* — U.S. —, 112 S.Ct. 63, 116 L.Ed.2d 39 (1991).

I also reject defendants' argument that the expert testimony was insufficient to support the jury verdict on the trespass claim. Defendants are incorrect in their assertion that plaintiffs' experts' opinions were based wholly on speculation or conjecture unsupported by any facts or data.

Baker, for example, opined that Southview's manure application caused nitrates to enter ground water through a process known as nitrification. He stated that this process is caused by microorganisms, and occurs at temperatures above fifty degrees. Def.Ex. J at 25. He also stated that these nitrates will enter the ground water if there are no crops present to take up the nitrates, and that because nitrates are water soluble, "if water moves, nitrates move with it. There's no retardation of the nitrates by the soil." *Id.* at 26.

Chiarenzelli based his opinion that nitrates found in the plaintiffs' wells had come from Southview Farm on his understanding of water flow and the topography of the area in question. Def.Ex. K at 105-06. He explained how he arrived at his opinion, and his testimony was not simply unsupported speculation.

Defendants' argument that Chiarenzelli's opinion was worthless because it was based on the opinions of Baker is without merit. Baker stated that he believed that the nitrates in the plaintiffs' wells came from Southview because Southview was "the only significant nitrate source up-gradient of the plaintiffs' wells." Def. Ex. K at 105.

I note again that defendants made no objection to the admission of this opinion on this ground at trial. They therefore waived any argument that the testimony was inadmissible. *Bilzerian,* 926 F.2d at 1294-95.

Second, the only authority offered by defendants for the proposition that an expert cannot base an opinion on the opinion of another expert, *United States v. 102.93 Acres of Land*, 154 F.Supp. 258 (E.D.N.Y. 1957), *aff'd*, 257 F.2d 805 (2d Cir. 1958), is distinguishable in that the expert in that case based his conclusions on "the advise and counsel of others who were *not* called as witnesses." *Id.* at 261 (emphasis added). Thus, that case implicated a concern that was not present in the instant case, namely, the inability of the adverse party to cross-examine the expert whose opinions underlie the witness' opinion. Baker testified that Southview was indeed a source of nitrates, and defendants had the opportunity to, and did, cross-examine him concerning that opinion. *Cf. American Bearing Co. v. Litton Indus., Inc.*, 540 F.Supp. 1163, 1172 (E.D. Pa. 1982) (finding inadmissible economist's testimony based on alleged out-of-court statement of another expert who testified prior to economist, since other expert made no such statement when testifying, and defendant had no opportunity to cross-examine him about it.)

Moreover, *102.93 Acres* was decided prior to the adoption of the Federal Rules of Evidence, which expressly permit an expert to based an opinion even on otherwise inadmissible evidence if that evidence is "of a type reasonably relied upon by experts" in the same filed. Fed.R.Evid. 703. This rule has been held to permit an expert in one field to base on opinion in part on the opinions of other experts in other fields. *See United States v. 1,014.16 Acres of Land*, 558 F.Supp. 1238 (W.D.Mo. 1983), (real estate appraiser could consider opinions of forester and hydrologist in arriving at estimate of property's value, and forester could consider hydrologist's data to frame opinion on effect flooding would have on foliage), *aff'd*, 739 F.2d 1371 (8th Cir. 1984).

This view is perfectly sensible. As the district court observed in *1,014.16 Acres*, "[a]n expert cannot be an expert in all fields, and it is reasonable to expect that experts will

rely on the opinions of experts in other fields as background material for arriving at an opinion." 558 F.Supp. at 1242.

The import of Chiarenzelli's testimony, then, was merely that if one accepted Baker's opinion that nitrates from Southview entered streams and ground water, those nitrates would tend to be carried toward plaintiffs' property. If the jury did not credit Baker's opinion that the water contained nitrates, they simply would have been unconcerned with the direction of the flow of the water. This was effectively no different from having an expert given an opinion based on hypothetical facts, on the expectation that the jury will find those facts to exist in the actual case before them.

I am equally unpersuaded by defendants' argument that the experts were unable to state with certainty that there was a causal connection between defendants' activities and the nitrates in plaintiffs' wells. First, Baker did not need to testify on that matter. He was called to testify about the leaching of nitrates from manure into ground water, not about the movement of that ground water from defendants' to plaintiffs' property.

Defendants' argument that Baker's opinion was "totally speculative as evidenced by his statements that "it [nitrate] *probably* does [leach into the groundwater] by the time fall comes'...," Def. Mem. at 24, takes Baker's testimony out of context. Baker made this statement in response to a question whether "*all* of the nitrate that's left in the soil ... necessarily leach[es] into the ground water ..." Def.Ex. J at 77. He explained that when the weather turned cold in the fall, nitrification would be less likely to occur, so that some nitrates might remain in the soil. Merely because he did not state to an absolute certainty that one hundred percent of the nitrates present would have leached out of the soil by the end of the growing season did not render speculative his opinion that leaching did occur.

Similarly, Chiarenzelli's testimony was not merely speculative about the existence of a connection between nitrate contamination of plaintiffs' wells and defendants' activities at Southview Farm. At one point during cross-examination, defense counsel asked him, "But you concluded that it was highly likely [that there was a connection], even though you could not establish a direct connection; isn't that correct?" Chiarenzelli responded, "Right, you can almost never establish a direct connection." Viewed in context, Chiarenzelli's testimony did not mean that he was simply guessing about this matter; as defense counsel himself stated, Chiarenzelli had "concluded that it was highly likely that there was a causal connection." Def. Ex. K at 135. Furthermore, Chiarenzelli stated earlier in his testimony that in his opinion, "the nitrates in the plaintiffs' wells can only be coming from fields owned, rented and operated by Southview Farm." *Id.* at 105. His statement about never being able to establish a direct connection, then, could reasonably be taken to mean only that it was virtually impossible to prove the connection beyond all doubt, and that it was necessary to infer the connection from circumstantial evidence.

I conclude that Baker's and Chiarenzelli's testimony was properly before the jury and that it gave the jury a sufficient basis for their verdict on the trespass claim. Defendants were free to explore further the foundation of the experts' opinions through cross-examination, and to argue before the jury at the close of the case that the experts were not worthy of credence. *See Daubert v. Merrell Dow Pharmaceuticals,* — U.S. —, —, 113 S.Ct. 2786, 2798, 125 L.Ed. 2d 469 (1993) (noting value of cross-examination and presentation of contrary evidence as preferred means of challenging value of expert testimony). Beyond that, the weight to be given the experts' opinions was for the jury to consider, and in my view this evidence was sufficient to support the verdict concerning the trespass claims.

CONCLUSION

Based on the jury verdict rendered on May 19, 1993, judgment is entered in favor of all the plaintiffs on their trespass claim in the following amounts:

Karcheski Family	$1000.00
Lois E. Link/	
Daniel L. Wilson	$1000.00
Fagan Family	$1.00
Ferris Family	$100.00
Kirk Schroeder	$1000.00
Bly Family	$1000.00

Defendants' motion for judgment as a matter of law is denied as to the trespass claim.

Based on the jury's verdict, judgment is entered in favor of defendants on plaintiffs' nuisance and negligence claims, and on plaintiffs' Clean Water Act claims with respect to the following dates: November 14, 1989; November 15, 1989; November 16, 1989; February 19, 1991; October 18, 1991; and July 23, 1992.

Defendants' motion for judgment as a matter of law is granted in part, and judgment is entered in favor of defendants on all of plaintiffs' remaining Clean Water Act claims, specifically: July 12, 1989; July 13, 1989; August 22, 1989; September 26, 1990; and April 15, 1991.

IT IS SO ORDERED.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

33 U.S.C. § 1311(a) provides:

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1362(6) provides in relevant part:

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. § 1362(12) provides in relevant part:

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source.

33 U.S.C. § 1362(14) provides:

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

40 C.F.R. § 122.23 provides in relevant part:

> (a) Permit requirement. Concentrated animal feeding operations are point sources subject to the NPDES permit program.
>
> (b) Definitions.
>
> (1) "Animal feeding operation" means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:
>
> (i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and
>
> (ii) Crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.
>
> * * *
>
> (3) "Concentrated animal feeding operation" means an "animal feeding operation" which meets the criteria in Appendix B of this part, or which the Director designates under paragraph (c) of this section.
>
> (c) Case-by-case designation of concentrated animal feeding operations.
>
> (1) The Director may designate any animal feeding operation as a concentrated animal feeding operation upon determining that it is a significant contributor of pollution to the waters of the United States.

40 C.F.R. § 122.3 provides in relevant part:

> The following discharges do not require NPDES permits:
>
> * * *
>
> (e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23, discharges from concentrated aquatic animal production facilities as defined in § 122.24, discharges to aquaculture projects as defined in § 122.25, and discharges from silvicultural point sources as defined in § 122.27.
>
> (f) Return flows from irrigated agriculture.

40 C.F.R. § 122.26(13) provides:

> Storm water means storm water runoff, snow melt runoff, and surface runoff and drainage.